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IN THE

United States Supreme Court

ROBERT F. FRIEMANN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case presents two issues of importance to the district courts of the nation in administering criminal cases under the requirements of the Speedy Trial Act:

1. Can there be a waiver by means other than that authorized by the statute? More particularly, did the courts below err in holding that petitioner had "waived" his right to a speedy trial?

2. Is a violation of the Act subject to harmless error analysis on the view that dismissal would have been without prejudice and that the defendant would have been re-indicted?

3. Assuming "harmless error" analysis is applicable to the Act, was that test improperly applied in this case?

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No. 05-0000

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OCTOBER TERM, 2005

ROBERT F. FRIEMANN,

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v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINIONS BELOW

The decision and order of the United States Court of Appeals for the Second Circuit here sought to be reviewed is an unpublished summary order, a copy of which is reproduced in the Appendix to this Petition (1a). The District Court's order and memorandum decision explaining its reasons for denying petitioner's motion to dismiss on speedy trial grounds is unpublished. A copy of that opinion is reproduced in the Appendix (103a).

JURISDICTION

The decision and order sought to be reviewed was entered on June 17, 2005. By order entered September 6, 2005, the Court of Appeals denied petitioner's timely petition for rehearing (8a). This petition is being filed within 90 days of that date.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254 (1). The Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291.

STATUTORY PROVISIONS INVOLVED

18 United States Code § 3161 provides, in relevant part:

Time limits and exclusions

(a) In any case involving a defendant charged with an offense, the appropriate judicial officer, at the earliest practical time, shall, after consultation with the counsel for the defendant and the attorney for the Government, set the case for trial on a day certain, or list it for trial on a weekly or other short-term trial calendar at a place within the judicial district, so as to assure a speedy trial.

(b) Any information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested or served with a summons in connection with such charges. If an individual has been charged with a felony in a district in which no grand jury has been in session during such thirty-day period, the period of time for filing of the indictment shall be extended an additional thirty days.

(c) (1) In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs. If a defendant consents in writing to be tried before a magistrate judge on a complaint, the trial shall commence within seventy days from the date of such consent.

* * * *

(h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:

* * * *

(8) (A) Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attornev for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding

that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.

18 United States Code § 3162 provides, in part:

Sanctions

(a) (1) If, in the case of any individual against whom a complaint is filed charging such individual with an offense, no indictment or information is filed within the time limit required by section 3161(b) as extended by section 3161(h) of this chapter, such charge against that individual contained in such complaint shall be dismissed or otherwise dropped. In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice.

(2) *If a defendant is not brought to trial within the time limit required by section 3161(c) as extended by section 3161(h), the information or indictment shall be dismissed on motion of the defendant.* The defendant shall have the burden of proof of supporting such motion but the Government shall have the burden of going forward with the evidence in connection with any exclusion of time under subparagraph 3161(h)(3). In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the

dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice. *Failure of the defendant to move for dismissal prior to trial or entry of a plea of guilty or nolo contendere shall constitute a waiver of the right to dismissal under this section.*(Emphasis added)

28 United States Code § 2111

Harmless Error

On hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

Rule 52 of the Federal Rules of Criminal Procedure provides, in relevant part:

Harmless Error and Plain Error

(a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

Statement of the Case

At all relevant times petitioner was a New York State licensed Certified Public Accountant whose practice included business consulting advice.

Petitioner's Indictment

On October 26, 2001, petitioner was indicted, along with certain of his accounting clients and others, in a forty-six count indictment charging the named defendants with, *inter alia*, conspiracy, bribery, fraud, and money-laundering in connection with the obtaining of contracts for Beneficial Plan Administrators, Inc. (hereinafter "BPA") to administer health care plans for the County of Nassau, N.Y.

The original indictment was superseded several times. Indictment S-2 added income tax fraud charges against petitioner. By the end of December 2002 all co-defendants had pled guilty with the exception of Alt t Isernio, CEO of BPA, Michael Agoglia, an employee of BPA, and petitioner.

On December 20, 2002, the District Court granted petitioner's motion to have the BPA conspiracy charges and the tax charges tried separately, but denied his motion to have his trial severed from that of Messrs. Isernio and Agoglia on the BPA conspiracy.

The District Court Severance Order

On January 15, 2003, during jury selection for the then proposed joint trial of petitioner and co-defendants Isernio and Agoglia on indictment S-2, the District Court, with the government's consent, granted petitioner's renewed

motion for a severance. The District Court's severance order provided that petitioner "shall be tried on all counts presently pending against him in one trial, to be held *subsequent to Mr. Isernio and Mr. Agoglia's trial*" (28a; emphasis supplied). The court's reference to "one trial" referred to the District Court's earlier ruling that petitioner was entitled to two trials: one on the BPA conspiracy charges, and the second on the tax charges.. In its severance order the court did not address what it planned to do in the event that the then planned joint trial of Isernio and Agoglia did not finally resolve all charges against those defendants.

The Trial of Mr. Isernio and Mr. Agoglia

Following the severance, the "Mr. Isernio and Mr.Agoglia's trial" commenced. Agoglia was acquitted by the court at the close of the government's case. The case against Isernio ended in a mistrial on April 10, 2003, when the jury could not unanimously agree on a verdict.

On March 18, 2003, as the "Mr.Isernio and Mr. Agoglia's trial" was nearing a conclusion, petitioner requested a status conference (37a). However, the District Court did not hold that conference until June 27, 2003, over two months after "Mr. Iserno and Mr. Agoglia's trial" had concluded. At that conference, petitioner's counsel proposed an accelerated motion schedule to allow him to seek a pre-trial dismissal of the BPA conspiracy charges against petitioner based upon the prosecution's proof at "Mr.Isernio and Mr. Agoglia's trial", which had in fact exonerated petitioner of any involvement in that conspiracy. The Court set September 19, 2004 for the submission of any motion papers. The prosecution represented at that

time that the petitioner's proposed motion might become moot since it was re-evaluating the case against petitioner and considering the return of another superseding indictment (39a-41a, 44a). At that time the Court made no "ends of justice" finding, nor did the court or the prosecutor seek a speedy-trial waiver from petitioner.

On July 30, 2003, the prosecution obtained a new indictment against Isernio, unrelated to the conspiracy charges, and charging Isernio with currency-reporting violations. (Indictment No. 03CR866). Isernio was the sole defendant named in that indictment.

Petitioner's Speedy Trial Motion

When no superseding indictment against petitioner had been filed, on September 18, 2003 petitioner moved to dismiss S-2 on the ground that the government's time within which to try him had expired under the Speedy Trial Act (45a). Over five months had elapsed since April 10, 2003, when the District Court had declared a mistrial in the proceeding against Isernio—and thus had concluded "Mr. Isernio and Mr. Agoglia's trial."

On September 24, 2003, the prosecution obtained and filed indictment S-3 against Isernio alone, charging him with the BPA conspiracy that was the subject of indictment S-2 and on which Isernio had received a mistrial.

On September 26, 2003, within a week of petitioner's filing his Speedy Trial Act motion, the District Court held a pretrial conference with the prosecutor and Isernio's counsel. Neither petitioner nor his counsel was informed of or invited to the conference. At that conference, the District Court ordered that Isernio be tried on the new, unre-

lated, currency-reporting indictment on January 5, 2004, and Isernio's trial on indictment S-3, would commence on February 4, 2004.(93a-94a, 97a).

On October 15, 2003, nearly a month after petitioner's Speedy Trial motion had been filed, the prosecution returned an eight-count indictment, S-4, against petitioner only. This indictment dropped the BPA conspiracy charges, but retained the money-laundering conspiracy and income tax fraud charges from S-2 (10a). S-4 is the indictment on which petitioner was eventually tried.

On January 21, 2004, Isernio was found guilty by a jury on the new, currency-reporting indictment. Six days later, on January 27, 2004, Isernio pled guilty to S-3.

The District Court's Opinion

One month after that, on February 26, 2004, the District Court finally ruled on petitioner's Speedy Trial motion (103a).

This February 26, 2004 decision was rendered over five months after petitioner had, on September 18, 2003, made his Speedy Trial motion and ten months after, on April 10, 2003, the District Court had terminated the "Mr. Isernio and Mr. Agoglia's trial" by declaring a mistrial as to Isernio.

In its decision, the District Court stated that when she granted petitioner's renewed motion for a severance, petitioner had accepted the condition that the charges against him would be tried in but a single trial and that he "knew that his trial would occur *after* a resolution of the case against Isernio and Agoglia" (105a; emphasis the court's). This was incorrect.

In her decision, the District Court emphasized the word "after," but the key error was her substitution of the word "resolution" for the word "trial." The severance order had provided that petitioner's trial was to take place "after Mr. Isernio's and Mr. Agoglia's *trial*" (28a; emphasis added), a trial that was then already into jury selection. There is nothing in the record to support an interpretation of the severance agreement and order as meaning that petitioner would be tried only after a "resolution" of the case against Isernio, including retrials and even the trial of a separate, unrelated, future charge against him. Rather, all that petitioner had agreed to was that he was to be tried after the then imminent, even into jury selection, "Mr. Isernio and Mr. Agoglia's trial". The fact that the case against one of these defendants, Isernio, ended in a mistrial did not alter the clear and express terms of petitioner's agreement or of the Court's severance order.

On March 29, 2004, the District Court held a pre-trial telephone conference on S-4 at which the court orally denied petitioner's motion to renew his speedy-trial motion and announced that unless petitioner waived the speedy trial limitation, jury selection would begin the following day. Petitioner refused to waive his speedy-trial rights and jury selection began the next day (110a, 114a-15a).

On April 14, 2004, petitioner was acquitted by the jury on all but one count, Count Five, which charged that petitioner had falsely claimed an $11,011 deduction for the expense of maintaining an office in his home on a 1998 partnership return that he had prepared.[1] Petitioner was

[1] The counts on which petitioner was found not guilty had charged him with conspiracy to commit money laundering (Count 1)

sentenced to three-years probation and ordered to pay $3,082 restitution (116a). The conviction jeopardizes his CPA license and severely damages his professional reputation.

Petitioner's Appeal

Petitioner appealed to the Second Circuit, contending, *inter alia*, that the 11-month lapse of time from the conclusion of "Mr. Isernio and Mr. Agoglia's trial" (April 10, 2003) to jury selection for petitioner's trial on S-4 (March 30, 2004) violated the Speedy Trial Act.

While petitioner's appeal was pending, the Second Circuit decided *United States v. Zedner*, 401 F.3d 36, Pet. for cert. pending, No.05-5992, holding both that the Speedy Trial Act could be "waived" and that the "harmless error" doctrine applied to violations of the Act.

On June 17, 2005, the Second Circuit affirmed petitioner's conviction, holding with respect to petitioner's Speedy Trial Act argument that (i) petitioner had "waived" his rights under the Act, and (ii) "[e]ven if we assume *arguendo* that [petitioner's] speedy trial right's were violated . . . such error was harmless" (4a), citing and relying upon both *Zedner* and its earlier decision in *United States v. Gambino*, 59 F.3d 353, 360 (2nd Cir. 1995), cert. den. 517 U.S. 1187.

In its "not for publication" opinion affirming petitioner's conviction, the Court of Appeals stated the following with respect to petitioner's Speedy Trial Act claims:

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and a series of tax counts related to his allegedly having aided and assisted the BPA conspiracy (10a).

Friemann ... alleges that his rights under the Speedy Trial Act, 18 U.S.C. § 3162, were violated when the Government failed to try him within 70 days of April 10, 2003, the date on which the District Court declared a mistrial in the case against Albert E. Isernio, Friemann's former co-defendant. On appeal, dispute centers on whether Friemann, by agreeing to delay his trial pending the outcome of Isernio's, waived his speedy trial rights for the one year period *following* Isernio's mistrial, even when this event was apparently not foreseen by either party.

The Speedy Trial Act authorizes district courts to "exclude[ ]" time from the prescribed 70-day period for certain kinds of delays. *See* 18 U.S.C. § 3161(h)(1)-(8). Apart from these exclusions, defendants generally may not waive Speedy Trial Act protections because of the public's independent interest in prompt criminal trials. *United States v. Gambino*, 59 F.3d 353, 360 (2d Cir. 1995. We permit waiver, however, when delays result from defendants having "request[ed] an adjournment that would serve the ends of justice." *United States v. Zedner*, 401 F.3d 36, 45 (2d Cir. 2005).

.... On the record before us, we conclude that the District Court did not err in deciding that "any delay caused by Isernio's mistrial...is directly attributable to Friemann's motion to sever." Here, as in *Zedner*, the Government was fully prepared to try the defendant—indeed jury selection was already under way—and the case

> was delayed only at Friemann's request. Further, the District Court did not err in finding that (1) the adjournment of Friemann's trial was designed to promote goals of judicial efficiency, and (2) this goal could not be attained by proceeding with Friemann's trial prior to the ultimate resolution of Isernio's case. That Friemann acquiesced in delaying his trial in this manner is strongly suggested by his failure to raise any speedy trial objections between June 19, 2003, when he now alleges that the speedy trial "clock" expired, and September 18, 2003, when he filed this motion. (3a-4a)

Having accepted a non-statutory waiver exception to the Speedy Trial Act, the Second Circuit then confirmed its *Zedner* holding that any error as to the waiver was nonetheless "harmless," stating:

> Even if we assume *arguendo* that Friemann's speedy trial rights were violated, the District Court properly denied Friemann's motion because any such error was harmless. *See Zedner*, F.3d at 47-48; *Gambino*, 59 F.3d at 362-63. Had the District Court dismissed the indictment on speedy trial grounds, it would have done so "without prejudice" because the charged offenses were serious, the Government acted in good faith, the defendant benefitted significantly from delays, and Friemann failed repeatedly to raise any speedy trial concerns. In such circumstances, the Government could (and likely would) have re-indicted Friemann, leaving Friemann's legal

> position unchanged. On nearly identical facts in *Gambino*, we held that the District Court's denial of a motion to dismiss on speedy trial grounds constituted harmless error, and we follow that holding here. 59 F.3d at 363. (4a-5a)

In short, the Court of Appeals affirmed petitioner's conviction on waiver grounds and then backed up its decision with a harmless-error analysis that, one, had never been relied upon by the District Court, and, two, for all practical purposes, eviscerates the Speedy Trial Act's mandatory provisions.

Reasons for Granting the Writ

On August 22, 2005, counsel for the defendant in *United States v. Zedner* filed with this Court a petition for certiorari seeking review of *Zedner's* conviction (No. 05-5992). In his petition for certiorari counsel for *Zedner* has exhaustively set forth why he believes certiorari should be granted to review the issues presented by that case. Rather than burdening this Court with a full repetition of all that counsel has there so fully and well argued as to why this Court should review these issues, we here adopt and incorporate by reference what *Zedner* has set forth in his petition as to why these are issues warranting review by this Court.

In addition to what counsel for *Zedner* has argued in his petition concerning "waiver" and "harmless error" under the Speedy Trial Act, we note the following with respect to

why petitioner Friemann's case also warrants review by this Court:

A. *The Waiver Issue*

1. The split in the circuits as to whether and to what extent a defendant can waive his Speedy Trial Act rights warrants this Court's granting review in this case.

There exists a deep division among the circuits as to whether a defendant may waive rights under the Act other than as the Act specifically provides, that is, by going to trial or pleading guilty or nolo contendere without moving to dismiss under the Act. For example, the Fifth Circuit refused to adopt a waiver exception in *United States v. Willis*, 958 F.2d 60 (5th Cir. 1992), at 64:

> District courts must take seriously the dictates of the Speedy Trial Act in the day-to-day operations of their courtrooms both when setting trial dates and when ruling on continuances. District courts may not under daily pressures of docket avoid these congressionally mandated strictures by creating judicial exceptions which swallow the rule . . . *If Congress is troubled by the effects of the dismissal remedy in these cases, it may provide an additional exception under the Act for continuances requested by defendants.* Until that time we are bound by the provisions of the Act. (emphasis added)

Willis has been followed by the Third, Sixth, Eighth, Ninth and Tenth Circuits.[2]

On the other hand, the First Circuit in *United States v. Pringle*, 751 F.2d 419 (1984), held that a defendant may waive his or her speedy trial rights where the defendant caused the delay, despite the District Court's failure to make an ends of justice finding. *Pringle* bars a dismissal where "[i]n essence, defendants would have successfully worked *both sides of the street, lulling the court and prosecution into a false sense of security only to turn around later* and use the waiver induced leisurely pace of the case as grounds for dismissal." *Id.* at 434, emphasis added. In addition to this view being followed by the Second Circuit in *Zedner*, it is also followed by the Fourth and Seventh Circuits. See *United States v. Keith*, 42 F.3d 234 (4th Cir. 1994); *United States v. Kucik*, 909 F.2d 206 (7th Cir. 1990).

However, these decisions allowing such a waiver ignore that a plain reading of 18 U.S.C. § 3161(h)(8)(A)'s "ends of justice" exclusion shows that by that provision Congress intended to deal with the possibility of a defendant's attempting to "sand bag" the district court by imposing *upon the district courts* the duty to monitor and responsibly manage their criminal cases. Thus, before granting a continuance beyond the limitations period, the District

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[2] *See, e.g., United States v. Carrasquillo*, 667 F.2d 382, 391 (3d Cir. 1981); *United States v. Blackwell*, 12 F.3d 44, 48 (5th Cir.1994); *Greenup v. United States*, 401 F.3d 758, 764, Nos. 03-6530, 03-6580 (6th Cir. Mar. 29, 2005), *ordered unpublished* (6th Cir. June 2, 2005), *reh'g en banc denied* (6th Cir. Aug. 2, 2005); *United States v. Ray*, 768 F.2d 991, 998 n.11 (8th Cir. 1985), *overruled on other grounds; Henderson v. United States*, 476 U.S. 321 (1986); *United States v. Ramirez-Cortez*, 213 F.3d 1149, 1154 (9th Cir. 2000); *United States v. Pasquale*, 25 F.3d 948, 951-52 (10th Cir. 1994).

Court is obligated to first consider the public's interest in prompt prosecution before granting an adjournment under that exclusion.

That provision allows the exclusion of:

> [a]ny period of delay resulting from a continuance granted by any judge on his own motion or at the request of a defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial.

But, at the same time, the statute also specifically provides that:

> *[n]o such delay* resulting from a continuance granted by the court in accordance with this paragraph *shall be excludable* under this subsection *unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by granting of such continuance outweigh the best interests of the public and defendant in a speedy trial.* (emphasis added.)

Of course, no such record was ever made by the District Court in this case. There was, very simply, no "ends of justice" finding and no weighing of the public's or the defendant's interest in a speedy trial. This case demonstrates the wisdom of this statutory scheme. Here, had the District Judge properly addressed the Speedy Trial issue at the June 27, 2003 status conference, or even in September when the Speedy Trial Act motion was filed, the record

would have been clear as to what the Court had in mind, and the parties would have been afforded a fair opportunity to express their positions and desires.

Finally, it is clear that this Court has not ruled on the issue of waiver presented by this petition, which in *New York v. Hill*, 528 U.S. 110 (2000) this Court recognized. There, this Court found that a defendant could waive the time limitations under the provisions of the Interstate Agreement on Detainers. However, when considering arguments based upon the Speedy Trial Act, the Court was careful to point out that: "the Speedy Trial Act is not before us today, and we express no view on the subject." *Id.* at 117 fn. 2.

With all respect, this Court should use this case to address this so-important issue on which the Circuit Courts have disagreed.

2. There was in this case no sufficient factual basis for the finding of waiver that the Court of Appeals made.

Although it is our view that the Speedy Trial Act does not allow for *any* means of "waiving" its protections other than as specifically provided for in §3162(a)(2) of the Act, we submit that, even if a non-statutory "implicit" waiver were to be allowed, as the Second Circuit has here held, on the record in this case there was no sufficient factual basis for finding the "waiver" that the courts below found in this case. *Compare*, *New York v. Hill's* focusing on the specific factual record in that case in finding that there respondent Hill had to be held to have waived the IAD's protections against delay. 528 U.S. at 112.

Here, petitioner never asked for, or in any other way sought, delay. Rather, for entirely good and sufficient reasons defense counsel renewed his earlier denied motion for a severance from the trial of Isernio and Agoglia (See 29a, defense counsel's letter to District Court dated January 14, 2003).[3] And, by petitioner's counsel having agreed to the government's counter-proposal that petitioner be tried following the upcoming trial of Isernio and Agoglia (32a), plainly, petitioner never "prospective[ly] waive[d] all protection of the [Speedy Trial Act] time limits or of the [Act] generally." See *New York v. Hill*, 528 U.S., at 115. Nor, just as plainly, did petitioner ever agree that his trial should be had following a *retrial* of Isernio, much less that petitioner's trial would not be had until after Isernio had first been tried on an *unrelated* indictment and then, in addition, only after the original charges against Isernio had been altogether concluded—which further proceedings took over nine months following the April 10, 2003 mistrial to conclude.

Clearly, to find such a "waiver" of a statutory right under these circumstances goes contrary to the very notion of what the concept of waiver means in our law. See, *e.g.*, *New York v. Hill*, 528 U.S. at 114-15, and cases there cited.

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[3] In that letter, defense counsel stated:

"Taken together with the allocutions [of the co-defendants] and our appraisal of all the evidence in the case this document [Gov. Exh. 597] demonstrates the good faith nature of our effort to assert, as we must, that there was a conspiracy to bribe McDonald but that knowledge of the conspiracy was purposefully kept from Mr. Friemann... We are frankly surprised that the Government has not consented to a severance, as our defense would necessarily jeopardize the fairness and integrity of any conviction the Government may obtain against Mr. Isernio."

B. *The Harmless Error Issue*

1. The Court of Appeals' holding that "harmless" error analysis was applicable to this case conflicts with the plain language of the Speedy Trial Act and with what the legislative history reveals was the intention of Congress in enacting it.

In *Zedner*, the Second Circuit conceded that the Speedy Trial Act provides on its face for only one sanction: "the indictment shall be dismissed." See 401 F.3d at 42, 47. However, the Court of Appeals drew upon Federal Rule of Criminal Procedure 52(a) and Section 2111 of Title 28, United States Code, to conclude that any violation of the Act which had there occurred should be considered harmless and ignored. This was, we submit, an altogether unwarranted ruling.

In fact, Rule 52 (a) and 28 U.S.C. § 2111 both predated the 1974 enactment of the Speedy Trial Act. And, there is nothing in either the language or the legislative history of the Speedy Trial Act, which indicates that the dismissal sanction was to be subject to "harmless error." Rather, the language and history of the Act, both as originally enacted and as later amended, reveal that this legislation represented Congress' response to what it perceived to be a persistent problem of the government's failure to accord defendants prompt trials.

In *United States v. Taylor*, 487 U.S. 326 (1988), this Court observed that the Speedy Trial Act "admits no ambiguity in its requirement that when [a violation of the Act] has been demonstrated, 'the information or indictment *shall* be dismissed on motion of the defendant.'" 487 U.S.

at 332, emphasis added, quoting 18 U.S.C. § 3162(a)(2); *see also* 487 U.S. at 341 n.12. In *Taylor*, the narrow issues before the Court had to do with "the bounds of a district court's discretion to choose between dismissal with and without prejudice, as a remedy for a violation of the [Act]." I*d.* at 326-27. But, that decision's review and treatment of the Speedy Trial Act's language and legislative history is also most pertinent in this case, in that there, in discussing how the Act's "remedy provision," § 3162(a)(2), should be construed and applied, this Court specifically discussed how the issue of "prejudice" to a defendant should be considered, along with the factors set forth in § 3162(a)(2), *at the remedy stage. Id.*, at 341. It gave no indication that the statutory "remedy" of dismissal could be avoided by either a district court or a court of appeals' resort to "harmless error" analysis; rather, the clear import of *Taylor* was that the issue of "prejudice" was to be addressed only in the context of the court's deciding whether the dismissal of charges against the defendant should be with or without prejudice.

Further, in *Taylor* Justice Blackmun pointed out that "courts are not free to exercise their equitable powers in fashioning an appropriate remedy" for a violation of the Act (487 U.S., at 342) and that:

> Dismissal without prejudice is not a toothless sanction: it forces the Government to obtain a new indictment if it decides to reprosecute, and it exposes the prosecution to dismissal on statute of limitations grounds. Given the burdens borne by the prosecution and the effect of delay on the Government's ability to meet those burdens, sub-

> stantial delay well may make reprosecution, even if permitted, unlikely.

In short, *Taylor* plainly indicated that the only "remedy" provided in the Act for a violation of that statute is the sanction set forth in section 3162(a)(2), that is, mandatory dismissal. *Accord United States v. Janik*, 723 F.2d 537 (7th Cir. 1983) (Posner, J.).[4]

2. The District Court's failure to dismiss the charges against petitioner was not "harmless error."

In this case the Second Circuit stated:

> Even if we assume *arguendo* that Friemann's speedy trial rights were violated, the District Court properly denied Friemann's motion because any such error was harmless. *See Zedner*, F.3d at 47-58; *Gambino*, 59 F.3d at 362-63. Had the District Court dismissed the indictment on speedy trial grounds, it would have done so "without prejudice"-because the charged offenses were serious, the Government acted in good faith, the defendant benefitted significantly from delays, and Friemann failed repeatedly to raise any speedy trial concerns. In such circumstances, the Government could (and likely would) have re-indicted Friemann, leaving Friemann's legal position unchanged.

---

[4] In *Zedner* the Second Circuit recognized that what it was doing was contrary to *Janik*, which it dismissed with simply a "But see. . . ." See 401 F.3d at 45.

By equating that "likely" without-prejudice dismissal of an indictment with harmless error, the Court of Appeals has drawn the teeth of the Speedy Trial Act and erred as a matter of law. As this Court recognized in *Taylor*, even a dismissal without prejudice is "not a toothless sanction" 487 U.S. at 342. It requires the government to reindict the defendant if it would continue to prosecute him—which in this case plainly would not have been as assured, as the Court of Appeals assumed.

If the United States Attorney's office had desired to re-present these charges to a new grand jury, it would first have had to secure authorization of the Tax Division of the Department of Justice. See United States Attorney Manual § 6-4.010, www.usdoj/usao/eousa/foia; 28 CFR § 0.70. Second, the prosecution would have had to point out to the Tax Division the evidence exonerating petitioner that was revealed at the first Isernio trial. In addition, petitioner's counsel would have had the opportunity to present these same considerations to the Tax Division to attempt to persuade it not to approve further prosecution. See U.S. Attorney Manual 6-4.214, *supra*.

Furthermore, even assuming that the District Court had dismissed without prejudice, the question of whether or not to re-present this matter to the grand jury would have been subject to prosecutorial discretion. At the time of the District Court's denial of the Speedy Trial motion, February 26, 2004, there existed several new factors that would have had to be weighed against seeking to reindict petitioner: (1) Isernio, the principal target of the BPA prosecution, had already been convicted in two separate cases; (2) exonerating testimony had been offered by prosecution witnesses at the Isernio trial, and it related to this petition-

er who had been acquitted on seven of the eight counts contained in S-4; and (3) petitioner was but a minor, peripheral defendant in the BPA conspiracy which was the subject of "Mr. Isernio and Mr. Agoglia's trial."

The Court of Appeals relied upon the October 15, 2003 return of S-4 against petitioner as an indication that re-presentment was inevitable (5a). However, S-4 was returned *before* Isernio's convictions had been obtained in January 2004 (A5a). Also, an order of dismissal without prejudice with respect to petitioner might have offered the government a good public excuse for not pursuing petitioner any further.

* * * *

The importance of the issues presented by this petition for the administration of federal criminal justice plainly requires guidance by this Court. The Circuits Courts are divided on the waiver issue, and the Second Circuit's application to this case of harmless-error analysis has the potential to emasculate the Speedy Trial Act, and re-write it, thereby depriving it of the effect intended by Congress. As this Court only very recently made clear, the first place to begin in attempting to determine the meaning of any statute is with the words of that statute. See *United States v. Olson*, 546 U.S. ___ (November 8, 2005), No. 04-759, Slip Op. At p.3 (in interpreting the Federal Tort Claims Act, court states, "We here interpret these words to mean what they say..."). What we have here argued here, gives effect to the words of the Speedy Trial Act and to what Congress intended by its adoption of this legislation. Congress provided that if there is a speedy trial violation "the indictment *shall* be dismissed" 18 U.S.C. § 3162 (a)(2) (emphasis added). The 1974 House Report on the then

proposed Speedy Trial Act, House Report No. 93-1508, quoted remarks by the late Chief Justice Rehnquist, who at the time had appeared as Assistant Attorney General, before the Senate Subcommittee, stating:

> Therefore, we are unwilling to categorically oppose the mandatory dismissal provision. For it well may be, Mr. Chairman, that the whole system of Federal Justice needs to be shaken by the scruff of its neck, and brought up short with a relatively peremptory instruction to prosecutors, defense counsel and judges alike that criminal cases must be tried within a particular period of time. That is certainly the import of the mandatory provisions of your bill."

1974 U.S. Code Cong. and Adm. News, pp. 7413-14.

The "mandatory dismissal provision" remains in the Speedy Trial Act to this day. Its language remains the same language that Justice Rehnquist had read. What we here urge is that this language must be given effect.

CONCLUSION

For the foregoing reasons this Court should grant the writ of certiorari to review petitioner's conviction.

Dated: November 22, 2005

Respectfully submitted,

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L. Kevin Sheridan

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, at Foley Square, in the City of New York, on the 17th day of June, two thousand and five.

No. 04-5506-cr

PRESENT:

JOSÉ A. CABRANES,
REENA RAGGI,
Circuit Judges,
LEONARD B. SAND,
Judge. *

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* The Honorable Leonard B. Sand, United States District Judge for the Southern District of New York, sitting by designation.

UNITED STATES OF AMERICA,

Appellee,

v.

ROBERT F. FRIEMANN

Defendant-Appellant,

ROBERT J. MCDONALD, ALBERT E. ISERNIO, WILLIAM M. BLAKE, JOHN R. BLAKE, DAVID J. BLAKE and WILLIAM PATTISON,

Defendants.

APPEARING FOR APPELLANT:	JOSEPH W. RYAN, JR. (L. Kevin Sheridan, *of counsel*), Uniondale, NY
APPEARING FOR APPELLEE:	EVAN WILLIAMS, Assistant United States Attorney (David C. James, Assistant United States Attorney, *of counsel*; Roslynn R. Mauskopf, United States Attorney for the Eastern District of New York, *on the brief*), United States Attorney's Office for the Eastern District of New York, New York, NY

SUMMARY ORDER

Appeal from a judgment of the United States District Court for the Eastern District of New York (Joanne Seybert, *Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court is **AFFIRMED.**

Defendant-appellant Robert F. Friemann appeals his judgment of conviction, entered by the United States District Court for the Eastern District of New York on October 1, 2004, on one count of making a false statement on a federal tax return in violation of 26 U.S.C. §7206(1).

On appeal, Friemann claims that (1) the District Court improperly denied his motion for dismissal pursuant to the Speedy Trial Act, (2) the evidence presented at trial was not legally sufficient to support his conviction, and (3) the Government unfairly altered its theory of the case in its summation.

Friemann first alleges that his rights under the Speedy Trial Act, 18 U.S.C. §3162, were violated when the Government failed to try him within 70 days of April 10, 2003, the date on which the District Court declared a mistrial in the case against Albert E. Isernio, Friemann's former co-defendant. On appeal, dispute centers on whether Friemann, by agreeing to delay his trial pending the outcome of Isernio's, waived his speedy trial rights for the one year period *following* Isernio's mistrial, even when this event was apparently not foreseen by either party.

The Speedy Trial Act authorizes district courts to "exclude[]" time from the prescribed 70-day period for certain kinds of delays. *See* 18 U.S.C. §3161(h)(1)-(8). Apart from these exclusions, defendants generally may not waive Speedy Trial Act protections because of the public's independent interest in prompt criminal trials. *United States v. Gambino*, 59 F.3d 353, 360 (2d Cir. 1995). We permit waiver, however, when delays result from defendants having "request[ed] an adjournment that would serve

the ends of justice." *United States v. Zedner*, 401 F.3d 36, 45 (2d Cir. 2005).

We review *de novo* the denial of Friemann's motion to dismiss, and we review related factual determinations for clear error.[1] On the record before us, we conclude that the District Court did not err in deciding that "any delay caused by Isernio's mistrial ... is directly attributable to Friemann's motion to sever." Here, as in *Zedner*, the Government was fully prepared to try the defendant—indeed jury selection was already under way—and the case was delayed only at Friemann's request. Further, the District Court did not err in finding that (1) the adjournment of Friemann's trial was designed to promote goals of judicial efficiency, and (2) this goal could not be attained by proceeding with Friemann's trial prior to the ultimate resolution of Isernio's case. That Friemann acquiesced in delaying his trial in this manner is strongly suggested by his failure to raise any speedy trial objections between June 19, 2003, when he now alleges that the speedy trial "clock" expired, and September 18, 2003, when he filed this motion.

Even if we assume *arguendo* that Friemann's speedy trial rights were violated, the District Court properly denied Friemann's motion because any such error was harmless. *See Zedner*, F.3d at 47-48; *Gambino*, 59 F.3d at 362-63. Had the District Court dismissed the indictment on speedy trial grounds, it would have done so "without prejudice" because the charged offenses were serious, the Government acted in good faith, the defendant benefitted significantly from delays, and Friemann failed repeatedly to raise any speedy trial concerns. In such circumstances, the Government could (and likely would) have re-indicted

---

[1] *United States v. Gaskin*, 364 F.3d 438, 450 (2d Cir. 2004).

Friemann,[2] leaving Friemann's legal position unchanged. On nearly identical facts in *Gambino*, we held that the District Court's denial of a motion to dismiss on speedy trial grounds constituted harmless error, and we follow that holding here. 59 F.3d at 363.

Friemann's second argument on appeal—that the evidence at trial was legally insufficient to support his conviction—is similarly without merit. Although we review *de novo* a district court's ruling regarding sufficiency of the evidence, a defendant challenging his conviction on this basis "bears a heavy burden." *United States v. Henry*, 325 F.3d 93, 103 (2d Cir. 2003). "In assessing a factual sufficiency challenge, we review the evidence in its totality, and in the light most favorable to the prosecution, mindful that the task of choosing among permissible competing inferences is for the jury, not a reviewing court." *United States v. Salmonese*, 352 F.3d 608, 618 (2d Cir. 2003) (citations omitted). We will uphold a jury's verdict if a "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

The record contains sufficient evidence, both direct and circumstantial, from which a rational factfinder could infer beyond a reasonable doubt that Friemann wilfully and knowingly made materially false statements on his tax returns concerning business deductions for S&F Consulting ("S&F"). When faced with motions to set aside the verdict, or in the alternative, grant a new trial, pursuant to Rules 29 and 33 of the Federal Rules of Criminal Proce-

---

[2] In fact, Friemann was indicted on a fourth superseding indictment on October 15, 2003, nearly one month *after* he raised his speedy trial motion, which was directed to the second superseding indictment of March 27, 2002.

dure, the District Court properly concluded that the testimony of multiple witnesses—including the defendant's nominal partner—supported the jury's conclusion that S&F never performed any consulting work and therefore could not have legitimately incurred the reported business expenses.

Friemann raises two specific objections relating to his insufficiency claim. First, he asserts that the District Court erred in finding that Ruth Schneider's testimony was sufficient to support his conviction. This claim fails because Schneider's remarks, when taken in conjunction with other testimony such as that of Agent Bishop and with Friemann's own admissions, suggest that S&F was a "shell" entity with no business operations or expenses.

Second, Friemann asserts that the jury's acquittal on the remaining counts charging money laundering undermines his conviction for false tax reporting. The District Court properly rejected this argument on the basis that the jury could have concluded that Friemann falsely reported expenses for S&F *regardless* of whether it believed that Friemann knew about the bribery and money laundering activities of his colleagues. Finally, defendant's reliance on *United States v. Coveney*, 995 F.2d 578, 592-94 (5th Cir. 1993), is unavailing because there it was undisputed that some legitimate business had been conducted, and the court held that the jury possessed insufficient evidence to conclude that reported deductions were fraudulent. Here, by contrast, the record suggests that S&F conducted no legitimate business and therefore any expenses claimed on its behalf were necessarily fraudulent and falsely reported.

Finally, defendant claims that the District Court improperly denied his motion for a new trial pursuant to Federal Rule of Criminal Procedure 33. Specifically, Friemann

contends that the Government unfairly "ambush[ed]" the defense by alleging for the first time in summation that Friemann's falsely claimed business deductions were motivated by a "personal enrichment theft scheme"—namely, his desire to finance home furnishings. We review Rule 33 determinations "with great caution," *United States v. DiPaolo*, 835 F.2d 46, 49 (2d Cir. 1987) (internal quotation marks omitted), upholding district court rulings "unless there has been an abuse of discretion." *United States v. Underwood*, 932 F.2d 1049, 1052 (2d Cir. 1991). No such abuse or error of law, *see Zervos v. Verizon New York, Inc.*, 252 F.3d 163, 167-69 (2d Cir. 2001), has taken place in this instance.

The District Court properly concluded that the Government neither misstated the evidence, constructively amended the grand jury indictment, nor impermissibly broadened its theory over the course of the trial. In any event, any unfairness was cured by Friemann's opportunity to cross-examine pivotal witnesses and by the District Court's careful jury instruction that opening and closing statements were not to be considered as evidence.

* * * *

We have considered each of Friemann's arguments and have found them to be without merit. The judgment of the District Court is therefore **AFFIRMED**.

FOR THE COURT,
Roseann B. MacKechnie, Clerk of the Court

By: _____

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL U.S. COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

Roseann B. MacKechnie
CLERK

Date:	9/2/05
Docket Number:	04-5506-cr
Short Title:	USA v. McDonald (Friemann)
DC Docket Number:	01-cr-1168
DC:	EDNY (CENTRAL ISLIP)
DC Judge:	Honorable Joanne Seybert

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 6th day of September, two thousand five.

No. 04-5506-cr
Filed: September 6, 2005

Present:

Hon. José A. Cabranes,
Hon. Renna Raggi,
Circuit Judges,

Hon. Leonard B. Sand,
District Judge.

USA,

v.

ROBERT F. FRIEMANN.

ORDER

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant, Robert F. Friemann. Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court,
Roseann B. MacKechnie, Clerk

By: [ILLEGIBLE] HELLER
Motion Staff Attorney

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Cr. No. *01 CR 1168 (S-4) (JS)*
(T. 18, U.S.C., §§ 1956(h), 981(a)(1), 982(b), 2 and 3551 *et seq.*; T. 26, U.S.C. §§ 7206(1) and 7206(2))

UNITED STATES OF AMERICA

—against—

ROBERT F. FRIEMANN,

Defendant.

THE GRAND JURY CHARGES:

INTRODUCTION

At all times relevant to this Superseding Indictment, unless otherwise indicated:

I. *The Defendant*

1. The defendant ROBERT F. FRIEMANN was a certified public accountant and a member of Albrecht, Viggiano, Zureck & Co., P.C. ("AVZ"), a certified public accounting firm located in Hauppauge, New York.

II. *Benefit Plan Administrators*

2. Benefit Plan Administrators, Inc. ("BPA") was a New York corporation, located in Melville, New York, which provided services to employers as a third-party administrator of employee health benefits through self-insurance plans. Under such plans, rather than paying premiums to insurance companies, employers assumed full responsibility for the cost of the health insurance claims submitted by individuals covered by the plan and paid fees to third-party administrators, such as BPA, which reviewed, processed and paid claims with the employers' funds. Albert E. Isernio was, at various times chief executive officer, president and chairman of BPA.

III. *Health Care Benefits for Employees of Nassau County*

3. Until approximately October 1996, the County of Nassau (the "County") provided health care benefits to its active and retired employees and their dependents through the New York State Health Insurance Program ("NYSHIP"). NYSHIP was a premium-based, fully-insured, health insurance program administered by the Department of Civil Service of the State of New York (the "State"). The County paid premiums to NYSHIP which, together with its insurance carriers, processed and paid health insurance claims submitted by, or on behalf of, the County's active and retired employees and their dependents.

4. From 1995 until his retirement in October 1997, Robert J. McDonald, the Chief Deputy County Executive, served as chairperson of a committee composed of County employees who sought cost savings by exploring alternatives to providing health care benefit coverage through

NYSHIP (the "Committee"). As Chief Deputy County Executive, McDonald owed the County and its citizens a duty of honest services, and was prohibited from receiving any secret payments in connection with County business.

IV. *The First BPA Contract*

5. In 1995, McDonald caused a Request For Proposals ("RFP") to be issued, which invited companies to submit proposals for health care insurance coverage plans for the County's Medicare eligible-retired employees ("MERs") and which specified that no commissions be paid in connection with the awarding of any contract by the County.

6. In February 1996, Isernio prepared and submitted a proposal which offered a self-insured plan to be administered by BPA (the "First BPA Proposal"). Although BPA agreed to comply with the RFP's prohibition against commissions, Isernio had agreed, if the contract was awarded to BPA, to pay commissions to The William M. Blake Agency, Inc. ("WMBA"), an insurance brokerage co-owned by William M. Blake.

7. On or about February 26, 1996, Ernst & Young ("E&Y"), a certified public accounting firm hired by the County, reported to McDonald that none of the proposals submitted, including the First BPA Proposal, guaranteed a reduction in the County's costs in providing health care coverage to the MER. The County continued NYSHIP coverage of the MER.

8. In May 1996, after the First BPA Proposal had been rejected, Isernio, William M. Blake, an insurance broker, and Herbert Schneider, a retired businessman, agreed to offer a bribe to McDonald in return for helping BPA win the award of the contract to administer a health plan for the

MER (the "MER Contract"). Schneider offered McDonald a bribe of $50,000 to ensure that BPA received the MER Contract. Although McDonald declined to accept this bribe, he did not report this illegal offer to County officials, nor did McDonald take any steps to disqualify BPA from consideration by the County as a potential provider of services.

9. For his efforts, Isernio, William M. Blake and Schneider agreed that Schneider would receive a portion of the County-prohibited commissions that Isernio agreed to pay to WMBA if BPA obtained the contract. Schneider directed that his portion of the commissions be paid to his wife.

10. On or about September 23, 1996, the County awarded BPA a 24-month contract to administer a self-insured health care plan for the MER for which the County would pay BPA approximately $4.5 million (the "First BPA Contract").

11. In December 1996, William M. Blake and John R. Blake, his brother and a WMBA co-owner, met with the defendant ROBERT F. FRIEMANN at AVZ. They agreed that, in preparing federal income tax returns for DJB Company, Inc. ("DJB"), a shell entity set up to receive the illegal commissions from BPA, AVZ would classify funds paid by BPA to DJB as "commissions," payments to Ruth Schneider from DJB as "consulting fees" and funds paid by DJB to WMBA as "administrative or management fees."

12. From December 1996 to February 1997, Schneider received County-prohibited commissions totaling $25,000 through three DJB checks made payable to Schneider's wife.

V. *The Second BPA Contract*

13. In July 1997, McDonald caused an RFP to be issued, which invited companies to submit proposals to the County to provide health care coverage for the County's active employees and non-Medicare eligible retired employees and their dependents [*sic*] (the "Second RFP").

14. Before the issuance of the Second RFP, Isernio and William M. Blake offered McDonald a bribe of $150,000 in return for his efforts in helping BPA win award of a contract to administer a health plan for all County employees and retirees. McDonald accepted this offer. Isernio, William M. Blake and McDonald agreed that the bribe would be paid to McDonald after he retired from his County position.

15. In August 1997, Isernio, with the assistance of BPA employees, prepared and submitted a proposal which offered a self-insured plan for all active and retired County employees, to be administered by BPA (the "Second BPA Proposal"), with a guarantee that the County would save between $15 and $18 million. In the proposal, Isernio falsely represented to the County that, in apparent compliance with the Second RFP's prohibition, "no broker commissions would be paid [by BPA] and no broker relationships would be recognized [by BPA]."

16. Schneider died in April 1997. In August 1997, the defendant ROBERT F. FRIEMANN demanded from William M. Blake a portion of the commissions that Schneider had been expected to receive from Isernio upon BPA's award of a contract by the County.

17. On or about August 22, 1997, McDonald's committee recommended to the County Executive that the County enter into a contract with BPA.

18. On September 11, 1997, the County awarded BPA a 39-month contract to administer a self-insured health care plan for all of the County's active and retired employees, including the MER, for which the County was to pay BPA approximately $26 million in administration fees.

19. On or about September 16, 1997, Isernio directed William M. Blake to pay McDonald and Schneider's wife from the commissions BPA would pay to DJB.

20. In October 1997, in order to receive the commissions from DJB, the defendant ROBERT F. FRIEMANN established a shell entity, S&F Consulting Associates ("S&F"), and opened a bank account in S&F's name.

21. In October 1997, the defendant ROBERT F. FRIEMANN provided a letter to William M. Blake, purportedly executed by Schneider's wife, in which she directed that the portion of the commissions payable to Herbert Schneider be paid to S&F.

22. On or about November 26, 1997, in order to conceal the transfer of the bribe payments and illegal commissions from BPA, Isernio signed an agreement with David J. Blake, the son of William M. Blake and a WMBA employee, under which BPA would pay commissions to DJB of $98,611 per month from October 3, 1997 through September 2000. In the agreement Isernio falsely labeled the commissions as "consulting fees."

23. In December 1997, the defendant ROBERT F. FRIEMANN met with William M. Blake, John R. Blake and

David J. Blake and devised a plan to distribute the commission payments from BPA.

24. From November 1996 to December 1998, Isernio caused BPA to pay to DJB a total of $2,074,887.

25. From December 1997 to December 1998, the defendant ROBERT F. FRIEMANN received checks on a monthly basis from DJB, made payable to S&F, and deposited and caused them to be deposited into S&F's bank account. Thereafter, FRIEMANN drew checks on the S&F account, which totaled approximately $216,976, made payable to himself and Schneider's wife, and caused these checks to be deposited into their respective bank accounts.

26. In late 1998, the defendant ROBERT F. FRIEMANN directed William M. Blake to lie to authorities if questioned about the payments from DJB to Schneider and S&F. FRIEMANN also gave Blake a document containing false information, which Blake was supposed to provide to authorities in an effort to mislead them about the true nature of the payments.

27. In order to conceal the true nature of the commission payments from BPA, the defendant ROBERT F. FRIEMANN prepared and caused to be prepared federal income tax returns for Herbert Schneider and his wife, S&F, DJB and WMBA for the calendar years 1996, 1997 and 1998. These returns contained numerous false statements, including, but not limited to, falsely identifying the commissions as managing and consulting fees; falsely listing Schneider's wife as a consultant; falsely claiming business deductions for Schneider's wife; and falsely claiming business deductions for S&F.

28. The County did not realize any savings by providing health care benefits through BPA, nor did the County or any County official approve or know about the payments to McDonald. Indeed, the County paid approximately $70 million more under the BPA plans than it would have if the County had remained with NYSHIP. Before it terminated its relationship with BPA and resumed NYSHIP coverage, the County paid BPA more than $12 million.

COUNT ONE
(Money Laundering)

29. The allegations contained in paragraphs 1 through 28 are realleged and incorporated as if set forth fully in this paragraph.

30. On or about and between January 1, 1996 and April 30, 1999, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendant ROBERT F. FRIEMANN, together with others, did knowingly and intentionally conspire to conduct financial transactions affecting interstate commerce, knowing that the property involved in such financial transactions represented the proceeds of some form of unlawful activity, and which property did in fact involve the proceeds of specified unlawful activity, to wit: mail fraud, in violation of Title 18, United States Code, Sections 1341 and 1346, (i) with the intent to promote the carrying on of such specified unlawful activity; and (ii) knowing that the transactions were designed in whole and in part to conceal and disguise the nature, the location, the source, the ownership and the control of the proceeds of the specified unlawful

activity, in violation of Title 18, United States Code, Sections 1956(a)(1)(A)(i) and 1956(a)(1)(B)(i).

(Title 18, United States Code, Sections 1956(h) and 3551 *et seq.*)

COUNT TWO
(False 1996 Schneider Return)

31. The allegations contained in paragraphs 1 through 28 are realleged and incorporated as if fully set forth in this paragraph.

32. On or about and between January 1, 1997 and April 15, 1997, both dates being approximate and inclusive, within the Eastern District of New York, the defendant ROBERT F. FRIEMANN knowingly and willfully aided and assisted to, and procured, counseled, and advised the preparation and presentation under, and in connection with a matter arising under the Internal Revenue laws, of returns, claims and other documents, to wit: a U.S. Individual Income Tax Return, Form 1040, attaching Schedule Cs, for Herbert Schneider and his wife for the tax year ending December 31, 1996, which was filed with the Internal Revenue Service ("IRS") Service Center in Holtsville, New York, which tax return was false and fraudulent as to a material matter, in that the return stated that Schneider's wife was in the business of consulting and that she had earned income and incurred expenses of $12,500 and $6,426, respectively, in conducting that business when, as FRIEMANN well knew and believed, Schneider's wife was not in the business of consulting and did not earn such income and incur such expenses in conducting that business, but instead received the $12,500 as a portion of the commissions from DJB.

(Title 26, United States Code, Section 7206(2); Title 18, United States Code, Sections 3551 *et seq.*)

COUNT THREE
(False 1997 Schneider Return)

33. The allegations contained in paragraphs 1 through 28 are realleged and incorporated as if fully set forth in this paragraph.

34. On or about and between January 1, 1998 and April 15, 1998, both dates being approximate and inclusive, within the Eastern District of New York, the defendant ROBERT F. FRIEMANN knowingly and willfully aided and assisted to, and procured, counseled, and advised the preparation and presentation under, and in connection with a matter arising under the Internal Revenue laws, of returns, claims and other documents, to wit: a U.S. Individual Income Tax Return, Form 1040, attaching Schedule Cs, for Herbert Schneider and his wife for the tax year ending December 31, 1997, which was filed with the IRS Service Center in Holtsville, New York, which tax return was fraudulent and false as to a material matter, in that the return listed Schneider's wife's occupation as a consultant and that she received $37,466 from her "material participation" in the business of S&F when, as FRIEMANN well knew and believed, Schneider's wife was not a consultant and the $37,466 she received was not for material participation in the business of S&F, but instead represented a portion of the commissions from DJB.

(Title 26, United States Code, Section 7206(2); Title 18, United States Code, Sections 3551 *et seq.*)

COUNT FOUR
(False 1997 S&F Return)

35. The allegations contained in paragraphs 1 through 28 are realleged and incorporated as if fully set forth in this paragraph.

36. On or about and between January 1, 1998 and April 15, 1998, both dates being approximate and inclusive, within the Eastern District of New York, the defendant ROBERT F. FRIEMANN knowingly and willfully made and subscribed a U.S. Partnership Return of Income, Form 1065, for S&F, for the tax year ending December 31, 1997, which was verified by a written declaration that it was made under the penalties of perjury, and which was filed with the IRS Service Center in Holtsville, New York, which return he did not believe to be true and correct as to every material matter, in that the return stated that the principal business activity of S&F was consulting, S&F received $87,500 in gross receipts or sales as a result of conducting a consulting business and the return was prepared and signed by a partner of AVZ when, as FRIEMANN well knew and believed, the principal business of S&F was not consulting, S&F had not received $87,500 as gross receipts or sales as a result of conducting a consulting business but as a portion of the commissions from DJB, and the return had not been prepared and signed by a partner of AVZ.

(Title 26, United States Code, Section 7206(1); Title 18, United States Code, Sections 3551 *et seq.*)

COUNT FIVE
(False 1998 S&F Return)

37. The allegations contained in paragraphs 1 through 28 are realleged and incorporated as if fully set forth in this paragraph.

38. On or about and between January 1, 1999 and April 15, 1999, both dates being approximate and inclusive, within the Eastern District of New York, the defendant ROBERT F. FRIEMANN knowingly and willfully made and subscribed a U.S. Partnership Return of Income, Form 1065, for S&F, for the tax year ending December 31, 1998, which was verified by a written declaration that it was made under the penalties of perjury, and which was filed with the IRS Service Center in Holtsville, New York, which he did not believe to be true and correct as to every material matter, in that the return stated that the principal business of S&F was consulting, S&F received $149,125 in gross receipts or sales from its consulting business, S&F had incurred $11,011 in deductible business expenses in conducting that business, and the return had been prepared and signed by a member of AVZ when, as FRIEMANN well knew and believed, the principal business of S&F was not consulting, S&F had not received $149,125 as gross receipts or sales from the conduct of a consulting business but as a portion of the commissions form [*sic*] DJB, S&F had not incurred $11,011 in deductible business expenses in conducting that business, and the return had not been prepared and signed by a partner of AVZ.

(Title 26, United States Code, Section 7206(1); Title 18, United States Code, Sections 3551 *et seq.*)

COUNT SIX
(False 1996 DJB Return)

39. The allegations contained in paragraphs 1 through 28 are realleged and incorporated as if fully set forth in this paragraph.

40. On or about and between January 1, 1997 and March 15, 1997, both dates being approximate and inclusive, within the Eastern District of New York, the defendant ROBERT F. FRIEMANN knowingly and willfully aided and assisted in, and procured, counseled, and advised the preparation and presentation under, and in connection with a matter arising under the Internal Revenue laws, of returns, claims and other documents, to wit: a U.S. Income Tax Return for an S Corporation, Form 1120S, for DJB, for the tax year ending December 31, 1996, which was filed with the IRS Service Center in Holtsville, New York, which return was false and fraudulent as to a material matter, in that the return stated that DJB paid $12,500 for consulting fees, and deducted this amount as a business expense, when, as FRIEMANN well knew and believed, DJB did not pay these funds for consulting, but instead as part of the commissions from BPA, which were not deductible.

(Title 26, United States Code, Section 7206(2); Title 18, United States Code, Sections 3551 *et seq.*)

COUNT SEVEN
(False 1997 DJB Return)

41. The allegations contained in paragraphs 1 through 28 are realleged and incorporated as if fully set forth in this paragraph.

42. On or about and between January 1, 1998 and March 15, 1998, both dates being approximate and inclusive, within the Eastern District of New York, the defendant ROBERT F. FRIEMANN knowingly and willfully aided and assisted in, and procured, counseled, and advised the preparation and presentation under, and in connection with a matter arising under the Internal Revenue laws, of returns, claims and other documents, to wit: a U.S. Income Tax Return for a [*sic*] S Corporation, Form 1120S, for DJB, for the tax year ending December 31, 1997, which was filed with the IRS Service Center in Holtsville, New York, which return was false and fraudulent as to a material matter, in that the return stated that DJB paid $87,500 for consulting fees, and deducted this amount as a business expense, when, as FRIEMANN well knew and believed, DJB did not pay these funds for consulting, but instead as part of the commissions from BPA, which were not deductible.

(Title 26, United States Code, Section 7206(2); Title 18, United States Code, Sections 3551 *et seq.*)

COUNT EIGHT
(False 1998 DJB Return)

43. The allegations contained in paragraphs 1 through 28 are realleged and incorporated as if fully set forth in this paragraph.

44. On or about and between January 1, 1999 and September 20, 1999, both dates being approximate and inclusive, within the Eastern District of New York, the defendant ROBERT F. FRIEMANN knowingly and willfully aided and assisted in, and procured, counseled, and advised the preparation and presentation under, and in connection with

a matter arising under the Internal Revenue laws, of returns, claims and other documents, to wit: a U.S. Income Tax Return for an S Corporation, Form 1120S, for DJB, for the tax year ending December 31, 1998, which was filed with the IRS Service Center in Holtsville, New York, which return was false and fraudulent as to a material matter, in that the return stated that DJB paid $149,125 for consulting fees, and deducted this amount as a business expense, when, as FRIEMANN well knew and believed, DJB did not pay these funds for consulting, but instead as part of the commissions from BPA, which were not deductible.

(Title 26, United States Code, Section 7206(2); Title 18, United States Code, Sections 3551 *et seq.*)

CRIMINAL FORFEITURE ALLEGATION

45. As a result of the offense set forth in Count One, the defendant ROBERT F. FRIEMANN shall forfeit to the United States, pursuant to Title 18, United States Code, Section 982(a)(1), all right, title and interest in any and all property, real and personal, involved in such offense and any property traceable to such property, including, but not limited to, (1) all money or other property that was the subject of each financial transaction that the defendant conspired to conduct and conducted in violation of Section 1956(h) of Title 18, United States Code; (2) all commissions, fees and other property obtained as a result of those violations; and (3) all property used in any manner or part to commit and to facilitate the commission of those violations. The value of the property to be forfeited is in the approximate amount of $2,074,887. Forfeiture may include the imposition of a money judgment against FRIEMANN.

46. If, as a result of any act or omission of the defendant ROBERT F. FRIEMANN, property described above in paragraph 45, or any portion thereof,

a. Cannot be located upon the exercise of due diligence;
b. Has been transferred or sold to, or deposited with, a third party;
c. Has been placed beyond the jurisdiction of the Court;
d. Has been substantially diminished in value; or
e. Has been commingled with other property which cannot be divided without difficulty the defendant shall forfeit substitute property, up to the value of the property described in subparagraphs 46(a) through 46(e) above, pursuant to Title 21, United States Code, Section, 853(p), as incorporated by Title 18, United States Code, Section 982(b).

(Title 18, United States Code, Sections 982(a)(1) and 982(b))

A TRUE BILL

_____
FOREPERSON

_____
ROSLYNN R. MAUSKOPF
UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK

BY: [ILLEGIBLE]
ACTING UNITED STATES ATTORNEY
PURSUANT TO 28 C.F.R. 0.131

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

01-CR-1168 (JS) (WDW)
Filed: January 15, 2003

UNITED STATES OF AMERICA,

—against—

ROBERT MCDONALD, *et al.*,

Defendants.

Appearances:

For United States:	Joseph R. Conway, Esq. Office of the United States Attorney Long Island Federal Courthouse 100 Federal Plaza Central Islip, New York 11722-4438
For Defendants:	
John R. Blake	Thomas J. Fitzpatrick, Esq. 500 Fifth Avenue, 33rd Floor New York, New York 10110
David J. Blake	Henry Putzel, III, Esq. 565 Fifth Avenue, 9th Floor New York, New York 10017

William Pattison	Francis J. Murray, Esq. 100 Merrick Road, Suite 514 West Rockville Centre, New York 11570
Robert F. Friemann	Joseph W. Ryan, Jr., Esq. EAB Plaza West Tower, 14th Floor Uniondale, New York 11556-0120
Robert J. McDonald	Kevin Keating, Esq. 666 Old Country Road, Suite 501 Garden City, New York 11530
William M. Blake	Robert G. Morvillo, Esq. Jeremy Hugh Temkin, Esq. Morvillo, Abramowitz, Grand, Iason & Silberberg, P.C. 565 Fifth Avenue New York, New York 10017
Albert E. Isernio	John R. Wing, Esq. Weil, Gotshal & Manges, LLP 767 Fifth Avenue New York, New York 10153
Michael Agoglia	Robert S. Fink, Esq. William Couzzi, Esq. Kostelanetz & Fink, LLP 530 Fifth Avenue New York, New York 10036

ORDER

SEYBERT, J., DISTRICT JUDGE:

Pending before the Court is a motion by Robert Friemann to sever the charges alleged against him from those against Albert Isernio and Michael Agoglia. The Government has consented to such severance provided that Mr. Friemann be tried in one trial for all counts pending against him, to which Mr. Friemann has no objection. The charges alleged against Mr. Friemann are hereby severed from those against Mr. Isernio and Mr. Agoglia. Mr. Friemann shall be tried on all counts presently pending against him in one trial, to be held subsequent to Mr. Isernio and Mr. Agoglia's trial.

SO ORDERED.

By: /s/ JOANNA SEYBERT
Joanna Seybert, U.S.D.J.

Dated: Central Islip, New York
January 15, 2003

[STAMP]
COUNSEL IS DIRECTED TO IMMEDIATELY NOTIFY ALL PARTIES OF THIS ORDER

[By hand]
faxed receipt attached.

[LETTERHEAD]

January 14, 2003

Honorable Joanna Seybert
United States District Judge
United States Courthouse
1034 Federal Plaza
Central Islip, NY 11722

Re: *United States v. Robert Friemann, et al.*
Docket No. 01-CR-1168-S-2 (JS)

Dear Judge Seybert:

As a follow up to our renewed motion for a severance made in court yesterday this letter briefly summarizes the key features of the co-defendant allocutions and other considerations on which the renewed motion is based.

As discussed in court yesterday, there is insufficient evidence of participation by Mr. Friemann in the bribery and mail fraud phases of the conspiracy charged in Count One to require that Mr. Friemann undergo trial with co-defendant Albert Isernio, against whom there will be what appears to be overwhelming proof on the Count One conspiracy. Neither Michael Blake, Jack Blake nor David Blake, in each of their sworn under oath allocutions, stated that Mr. Friemann was in any way responsible for the bribery and fraud upon Nassau County charged in Count One. Nor did any of the Blakes' allocutions assert that Mr. Friemann, in making the various alleged false financial entries, did so for the purpose of assisting them in committing the alleged briberies and fraudulent conduct.

To the contrary, assuming *arguendo* that Mr. Friemann had falsified certain financial records, the Blake allocutions present a reason for Mr. Friemann's actions that is

unrelated to the fraud upon Nassau County, namely, that Herbert Schneider had advised the Blakes that he wanted the income he earned on the BPA transaction to be assigned to his wife, Ruth, to avoid jeopardizing the disability benefits he was then receiving. Mike Blake makes it clear that in furtherance of Mr. Schneider's personal objectives—and not in furtherance of the fraud upon Nassau County—he prepared a consulting agreement between DJB and Ruth Schneider and furnished the document to Mr. Friemann and another unidentified AVZ partner.

The Government's accusation yesterday that our claim of antagonistic defenses has been manufactured for the eve of trial is misguided. As your Honor is aware, the antagonism of Mr. Friemann's and Mr. Isernio's defenses is based on the Blakes' allocutions, which did not occur until January 3 and 6, 2003. Additional new evidence related to the Blakes has been furnished to our office as late as this past weekend, when the Government faxed to us a handwritten notation alleged to have been made on September 16, 1997 but produced only in connection with Mike Blake's plea. This document, now listed as Proposed Trial Exhibit 597, appears to be a contemporaneous entry of an agreement to distribute, out of the additional commissions to be earned by the Blakes under the 1997 contract, $150,000 to McDonald and $80,000 to Ruth Schneider. Taken together with the allocutions and our appraisal of all the evidence in the case, this document demonstrates the good faith nature of our effort to assert, as we must, that there was a conspiracy to bribe McDonald but that knowledge of that conspiracy was purposefully kept from Mr. Friemann.

Approximately 80% of the Government's proof during the eight-week trial will be focused on the bribery and

fraud allegations against Mr. Isernio (indeed, less than 10% of the items on the Government's latest list of exhibits relate to Mr. Friemann). To require Mr. Friemann to undergo a two-month trial when there is such a disparity in proof, no evidentiary link between Mr. Friemann and the principal Count One conspiracy, and starkly antagonistic defenses between Mr. Friemann and co-defendant Isernio is, we respectfully submit, fundamentally unfair and more than ample grounds for severance under Federal Rule 14. We are frankly surprised that the Government has not consented to a severance, as our defense would necessarily jeopardize the fairness and integrity of any conviction the Government may obtain against Mr. Isernio.

Thanking you for your attention, I am

Very truly yours,

JWR:dm

JOSEPH W. RYAN, JR.

cc: AUSA Joseph R. Conway, Chief
Long Island Division
John R. Wing, Esq.

[stamp] U.S. Department of Justice

[by hand] original

U.S. Department of Justice

United States Attorney
Eastern District of New York

United States Attorney's Office
610 Federal Plaza
Central Islip, New York 11722-4454

Filed: January 15, 2003

BY HAND

Honorable Joanna Seybert
United States District Judge
United States Courthouse
1034 Federal Plaza
Central Islip, New York 11722

Re: United States v. Isernio, et al.
Criminal Docket No. 01 CR 1168 (S-2) (JS)

Dear Judge Seybert:

This letter is respectfully submitted in response to the renewed motion of defendant Robert Friemann for a severance. The basis of Friemann's motion is that he will assert a defense antagonistic to that of defendant Albert Isernio. For the reasons stated herein, the government consents to the request to sever Friemann, provided that Friemann consents to, or the Court orders, a trial of all counts now pending against Friemann in a single trial. Alternatively, if

the tax counts against Friemann remain severed from the remaining counts against him, the government opposes the application for a severance.

Friemann's Plan To Blame Isernio Does Not Support A Severance

In support of his severance application, Friemann asserts that "[w]e intend to join the government in its proof that Mr. Isernio participated in this scheme and we were victimized by Mr. Isernio, Mr. Blakes, plural, and all the other schemers who used professionals in this case to carry out their objective." January 13, 2003 Tr. at 3; *see also* letters from Joseph W. Ryan, Jr., Esq. to the Court dated January 13, 2003 and January 14, 2003. Friemann argues that his defense is antagonistic to that of Isernio and that severance of his case from Isernio and defendant Michael Agoglia is required. Isernio has joined in the motion to have Friemann severed.

In *Zafiro v. United States*, 506 U.S. 534 (1993), the Supreme Court rejected the argument that mutually antagonistic defenses require severance. The Court held that severance should be granted "only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." *Id.* at 539.

The Second Circuit has recognized that, after *Zafiro*, the circumstances under which severance is required for defendants who assert that a co-defendant is the real culprit are rare. *See United States v. Diaz*, 176 F.3d 52, 103-04 (2d Cir. 1999) (severance not required where defendant testified that co-defendant committed murder and co-defendant testified that defendant attempted to murder him); *United States v. Haynes*, 16 F.3d 29, 31-32 (2d Cir.

1994) (severance not required where defendant implicated by testimony of co-defendant); *United States v. Harwood*, 998 F.2d 91, 95-96 (2d Cir. 1993) (severance not required where each defendant accused the other of placing LSD in van).

Friemann's defense amounts to no more than an argument that he had no knowledge of the bribery, fraud and money laundering offense which the government will prove. This does not amount to a defense antagonistic to Isernio, as an antagonistic defense requires that "acceptance of one party's defense would tend to preclude the acquittal of [the] other." *United States v. Salameh*, 152 F.3d 88, 116 (2d Cir. 1998) (citations omitted). The jury in this case would be able to accept Friemann's defense, that he had no knowledge of any criminal activity, and still acquit Isernio based upon any defense he may reasonably be expected to raise.

Friemann's application also does not present any of the circumstances described by the Supreme Court in *Zafiro* as warranting severance, such as "when evidence that the jury should not consider against a defendant and that would not be admissible if a defendant were tried alone is admitted against a co-defendant." *Id.* at 539. Friemann does not assert that the evidence the government will present will change in any way because of his defense, or that he will present any additional evidence in support of the bribery, fraud and money laundering charges. In any event, the Supreme Court counseled in *Zafiro* that, even if there were any prejudice to one defendant because of a co-defendant's defense, "less drastic measures, such as limiting instructions, often will suffice to cure any risk of prejudice." 506 U.S. at 539.

For these reasons, severance is not required.

The Government Consents To Severance If There Is One Trial Of All Charges Against Friemann

As described above, a severance of the charges against Friemann is not warranted under Supreme Court and Second Circuit precedent. Nevertheless, the government is mindful of the fact that there will be a second trial against Friemann in order to try the tax charges against him, as they have been severed by the Court. Moreover, in order to understand the tax charges at a second trial, the government will be required to again present to the jury the evidence supporting the bribery, fraud and money laundering conspiracy charges. Thus, the trial of the tax counts against Friemann will not be lengthened by inclusion of the bribery, fraud and money laundering charges against him. Furthermore, a severance of Friemann as proposed by the government would shorten the trial against Isernio and Agoglia and reduce potential bases of appeal by all defendants.

However, it would be wasteful of the Court's resources and unduly burdensome on the government for the Court to try this case three times, once against Isernio and Agoglia, a second time against Friemann on the bribery, fraud and money laundering charges, and a third time against Friemann on the tax charges. The government opposes any severance which would yield this result.

For the reasons stated above, in the event Friemann consents to, or the Court orders, trial of all counts against Friemann in a single trial, the government consents to Friemann's application for a severance. Alternatively, if Friemann does not consent, and the court declines to order, a single trial of all counts against Friemann, the govern-

ment opposes the request for a severance for the reasons stated above.

Thank you for your consideration of this matter.

Respectfully submitted,

ROSLYNN R. MAUSKOPF
United States Attorney

By: /s/ JOSEPH R. CONWAY
Joseph R. Conway
Assistant U.S. Attorney

By: /s/ MICHAEL CORNACCHIA
Michael Cornacchia
Assistant U.S. Attorney

By: /s/ KEVIN P. MULRY
Kevin P. Mulry
Assistant U.S. Attorney

cc: John R. Wing, Esq. (by fax)
Joseph W. Ryan, Jr., Esq. (by fax)
Robert Fink, Esq. (by fax)
Clerk of the Court (JS)

[LETTERHEAD]

BY FACSIMILE AND MAIL

March18, 2003

Honorable Joanna Seybert
United States District Judge
United States Courthouse
1034 Federal Plaza
Central Islip, NY 11722

Re: *United States v. Robert Friemann, et al.*
Docket No. 01-CR-1168-S-2 (JS)

Dear Judge Seybert:

This will confirm our request for a Status Conference for the trial of Robert Friemann, as soon as the *Isernio* trial has been concluded.

Thanking you for your attention, I am

Very truly yours,

JWR:dm

JOSEPH W. RYAN, JR.

cc: AUSA Joseph R. Conway, Chief
Long Island Division

[1]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
U.S. Courthouse
Brooklyn, New York

CR-01-1168
Status Conference June 27, 2003 10:00 A.M.

UNITED STATES OF AMERICA,

—against—

ROBERT FRIEMANN,

Defendant.

BEFORE:

HONORABLE JOANNA SEYBERT
United States District Judge

Appearances:

For the Government: ROSLYNN R. MAUSKOPF, ESQUIRE
United States Attorney
610 Federal Plaza
Central Islip, New York 11722-4454
BY: JOSEPH CONWAY, ESQUIRE
Assistant U.S. Attorney

For the Defendant: JOSEPH RYAN, ESQUIRE
190 EAB Plaza
Uniondale, New York

Court Reporter: RONALD E. TOLKIN, RMR
Official Court Reporter
225 Cadman Plaza East
Brooklyn, New York 11201
(718) 260-2567

Proceedings recorded by mechanical stenography, transcript produced by Computer-Assisted Transcript.

[2]

(Time: 10:35 a.m.)

THE CLERK: United States versus Robert Friemann. Your appearances, please.

MR. CONWAY: Good morning, Your Honor.
Joseph Conway, for the government.

THE COURT: Good morning, Mr. Conway.

MR. RYAN: Good morning, Your Honor.
Joseph Ryan, for Mr. Friemann.

THE COURT: Good morning, Mr. Ryan.
I- understand that you had requested a conference because there are certain motions being contemplated?

MR. RYAN: Yes. We contemplate filing a motion on or before July 15th addressed to the non-tax counts, only the BTA portion of the indictment.

We believe that Your Honor can determine in advance of trial Mr. Friemann should not been subject to a trial based upon all of the revelations in the Isernio trial.

We would like to have a response from the government in 30 days, if that is possible, August 15th. So that we can look forward to some kind of resolution in September.

THE COURT: What is the government's position on this?

MR. CONWAY: Your Honor, our position is twofold. One, I believe, pretrial Mr. Ryan has made numerous motions [3] to dismiss count one, the mail fraud count, and money laundering count.

We would say at this time even with the testimony that was given in the trial of Albert Isernio, that those motions have never really been disposed of, and there is nothing in that testimony that would render additional motions to be made.

That being the case, if Your Honor is of the mind set to allow him to file the motions, we would ask for September 5th to respond. I can give you the reasons as to why I need the additional time.

THE COURT: Can you tell me what they are?

MR. CONWAY: Yes, Your Honor. They are twofold. One very simply reason is July and August with the vacation schedule, a lot of the trial team, as you know, will be scattered. As I believe we told you a couple of weeks ago, I was not present but Mr. 0Cornacchia and others were here.

We are trying to supercede the indictment. It is not adding charges but deleting charges.

THE COURT: The tax charges?

MR. CONWAY: Well, we are going to supercede our tax charges. The main case we are trying to conform that to the proof and actually reduce the indictment. In doing so we,

obviously, will be reexamining Mr. Friemann's position in that indictment as well.

[4] I think if we had until September 5th, that would give us additional time to make whatever decisions we need to make on cleaning that indictment up and superceding it, to have whatever charges we feel are necessary for the two trials that we are faced for in the future.

THE COURT: You are not looking to put Mr. Friemann in on a trial in the superceding indictment for the purposes of trying Mr. Isernio, are you?

MR. CONWAY: No. What we will do only in the sense that they are the two remaining defendants, but we have already agreed that they are separate trials. We will redact the indictments for each trial. In terms of superceding the initial indictments, since they are codefendants, we will do that as well.

We have no plans for one joint trial. They are two separate trials as the court has decided, and we have agreed to it in the past.

MR. RYAN: The problem that I have with the government's response is that we are filing a motion with respect to the current pending indictment, which is pending in this court, and it was superceded twice for over two and a half years.

We don't want to be confronted with another indictment that materially alters and changes the current one that we are addressing. So I am at a loss to understand why [5] in the superceding indictment we have to wait to September. If the superceding indictment can be cleaned up in short order, then we can file a motion addressed to that. I am at a loss to understand that. Unless there is some possibility

that upon evaluation of the case that Mr. Friemann will not be in the superceding indictment. That is also a possibility that I would certainly hope might occur.

MR. CONWAY: There will not be any material alterations, Your Honor. There is no contemplation of any added new charges. It is just conforming to the proof that we had in trying to reduce the amount of information in the indictment to make it a more concise, simpler instrument.

In doing so we will examine not only all of the evidence that came against Mr. Isernio but all of the evidence that we have against Mr. Friemann.

If in our judgment we believe that one of the mail fraud counts or one of the other counts is not warranted, that will be reflected in the superceding indictment. There certainly will be no additional charges and no additional information, and nothing to surprise Mr. Ryan.

THE COURT: I will give you until September but if you don't put include it in the superceding indictment—this investigation there has to be some resolution of this.

MR. CONWAY: Yes, Your Honor.

Just so you know, Your Honor, it is a superceding **[6]** indictment.

THE COURT: There spent three months on trial with one defendant still to have pending charges as to the tax counts to be resolved at a later time. I became a grandmother during the course of the whole process.

MR. CONWAY: That is a good thing.

THE COURT: It is a good situation. Perhaps it is but I don't want to be a great grandmother by the time it has resolved itself.

MR. CONWAY: Nor do I want to become a grandfather.

Just so you know, Your Honor, the superceding indictment is not in the general sense as we always use it to bring additional charges. This will actually reduce the scope of the indictment.

THE COURT: I am very hopeful.

The Isernio case is going to be tried in January, as we all know. I am not looking forward to another three months of trial on this, and I am sure that you are not as well.

MR. CONWAY: We are not, Your Honor.

THE COURT: Work real hard and see if you can widal [*sic*] away some of the extraneous matters, which will reduce the time spent on Isernio. Absent a total victory for Mr. Ryan we will reduce the time involved on the trial date for Mr. Friemann.

MR. CONWAY: That is certainly my hope, Your Honor.

THE COURT: Mr. Ryan, why don't you take until towards the end of July to get the papers in.

MR. RYAN: July 30th?

THE COURT: All right, July 30th.

Mr. Conway, you want September 5th?

MR. CONWAY: I believe that is the first Friday in September, is that correct?

THE COURT: Yes.

Mr. Ryan, how long do you want to respond to that? Do you want about two weeks.

MR. RYAN: Two weeks, Your Honor.

THE COURT: So we are looking at September 19th, is that right?

COURTROOM DEPUTY: Yes, Your Honor.

THE COURT: I will see you folks then.
Have a great summer.

MR. CONWAY: You, too, judge.

MR. RYAN: Take care, judge.

(Whereupon the matter was concluded.)

I, RONALD E. TOLKIN, HEREBY CERTIFY THAT:

(A) THE FOREGOING PAGES REPRESENT AN ACCURATE AND COMPLETE TRANSCRIPTION OF THE ENTIRE RECORD OF THE PROCEEDING BEFORE THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK, JUDGE SEYBERT PRESIDING IN THE MATTER OF UNITED STATES OF AMERICA AGAINST ROBERT FRIEMANN AND (B) THESE PAGES CONSTITUTE THE ORIGINAL TRANSCRIPT OF THE PROCEEDING.

THIS TRANSCRIPT CERTIFICATION IS VOID IF THE SIGNATURE IS NOT ORIGINALLY SIGNED BY THE COURT REPORTER WHO REPORTED THIS MATTER.

/s/ RONALD E. TOLKIN

RONALD E. TOLKIN, RMR
OFFICIAL COURT REPORTER

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Docket No. 01 CR 1168 (S-2) (JS)

UNITED STATES OF AMERICA

—against—

ROBERT F. FRIEMANN,

Defendant.

NOTICE OF MOTION

MOTION BY:	JOSEPH W. RYAN, JR., PC *Attorneys for Defendant* *ROBERT F. FRIEMANN*
DATE AND TIME:	At a date and time to be fixed by the Court
PLACE:	United States Courthouse Courtroom of Hon. Joanna Seybert 1030 Federal Plaza Central Islip, New York 11722
RELIEF SOUGHT:	For an order of dismissal pursuant to 18 USC § 3162, upon the ground that the Government has failed to provide Mr. Friemann with a trial within the 70-day limit provided by the Speedy Trial Act, following the declaration of

a mistrial of co-defendant, Albert E. Isernio on April 10, 2003 (a trial from which Mr. Friemann was severed).

SUPPORTING PAPERS: Affirmation and Memorandum of Law in Support of Motion to Dismiss under the Speedy Trial Act and Exhibits thereto

REPLY PAPERS: Any opposition papers are requested to be served at least five days before the motion deadline.

Dated: Uniondale, New York
September 18, 2003

Respectfully submitted,

JOSEPH W. RYAN, JR. (JR2408)

JOSEPH W. RYAN, JR., P.C.
Attorneys for Defendant
ROBERT FRIEMANN
190 EAB Plaza – 15 East
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(516) 663-6515

TO:
Honorable Roslyn Mauskopf
United States Attorney
610 Federal Plaza
Central Islip, NY 11722
Attention: AUSA Joseph Conway

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Cr. No. 01-CR-1168(S-2)(JS)

UNITED STATES OF AMERICA

—against—

ROBERT F. FRIEMANN,

Defendant.

AFFIRMATION IN SUPPORT OF MOTION FOR DISMISSAL

JOSEPH W. RYAN, JR., an attorney admitted to practice in the Courts of the State of New York, hereby affirms under penalty of perjury:

1. This affirmation is submitted in support of a motion for an order of dismissal pursuant to 18 USC § 3162, upon the ground that the Government has failed to provide Mr. Friemann with a trial within the 70-day limit provided by the Speedy Trial Act, following the declaration of a mistrial of co-defendant, Albert E. Isernio on April 10, 2003 (a trial from which Mr. Friemann was severed).

Overview

2. The Speedy Trial Act has been violated because as of the date of this affirmation, more than 150 non-excludible,

[*sic*] non-waived days have elapsed since the *Isernio* mistrial, and the clock continues to run. Mr. Friemann has made every effort to speedily resolve his case, by seeking to file a motion to dismiss the non-tax counts (on a briefing schedule that would likely have brought a ruling by early September), and by declaring his readiness for a prompt trial on the tax counts. But the Government frustrated Mr. Friemann's efforts by representing, at the time Friemann proposed the motion, that another, third, superseding indictment *might* be filed. Friemann's proposed motion obviously could not be filed while the specter of an S-3 hung in the air: if S-3 were in fact to materialize, it would render S-2 (and a motion attacking it) moot; and an evidence-based motion attacking S-2, filed while the Government was still presenting to the grand jury, would have been self-defeating, serving only to alert the government to deficiencies in its case that it might seek to redress in the grand jury. The Government's latest intentions are not to provide Mr. Friemann with a trial until mid-2004, more than three years after his arrest in June of 2001.

3. In support of the motion, we rely upon the arguments set forth in the accompanying memorandum of law and on the following facts, revealed by the record in this case.

Severance from the *Isernio* Trial

4. On January 13, 2003, during the course of jury selection in the joint trial of co-defendants Albert Isernio and Michael Agoglia, the Court granted Mr. Friemann's renewed motion for severance, upon the consent of the Government. The docket sheet shows that the Court ordered that, "Mr. Friemann shall be tried on all counts presently pending against him in one trial to be held sub-

sequent to Mr. Isernio and Mr. Agoglia's trial." Docket Sheet entry no. 217. The severance order did not address the possibility of a mistrial.

The *Isernio* Mistrial

5. As the lengthy *Isernio* trial drew to a close, on March 18, 2003, Mr. Friemann requested a pre-trial conference for the purpose of scheduling a trial immediately following the Isernio trial, in accordance with the severance order. Exhibit A.

6. On April 10, 2003, the Court declared a mistrial in *Isernio* upon the jury's failure to reach a unanimous verdict, and the retrial, initially scheduled for September 2003, was adjourned to January 4, 2004 at Mr. Isernio's request.

7. This left six months of 2003 for the trial of Mr. Friemann. Nonetheless, the Government made no arrangements during this time to conference, or reschedule, the Friemann trial, or to elicit a Speedy Trial waiver from Mr. Friemann.

Mr. Friemann's Effort to Speedily Resolve His Case

8. Contrary to the Government's inattention to his case, Mr. Friemann sought to resolve it expeditiously. The plan was (i) to promptly file a motion, based on the evidence in the *Isernio* trial, attacking the sufficiency of the BPA charges against him (conspiracy and money laundering), on a briefing schedule that it was hoped would bring a Court decision in September (given the Court's familiarity with the testimony), and (ii) to try the tax counts in the fall.

9. In furtherance of this plan Friemann requested a status conference to address the motion. At that conference, which was held on June 27, 2003, counsel for Mr. Friemann advised the Court and the Government of his proposal to file a motion to dismiss the non-tax (BPA) counts for insufficiency and his desire to promptly proceed to trial on the remaining tax Counts. Exhibit B.

10. Counsel for Friemann stated that the motion could be filed within approximately two weeks, on or before July 15, 2003, and asked for "a response from the government in 30 days, if that is possible" in order "that we can look forward to some kind of resolution in September." Exhibit B, p. 2. The Government first opposed the application by arguing that nothing in the testimony at the *Isernio* trial would justify additional motions, but then asked if it could have until September 5th to respond, citing the vacation schedule of the trial team.

11. But the Government then raised an additional issue at the conference, representing to the Court that it was "trying to supersede the indictment." AUSA Conway stated:

> In doing so we, obviously, will be reexamining Mr. Friemann's position in that indictment as well.
>
> I think if we had until September 5th, that would give us additional time to make whatever decisions we need to make on cleaning that indictment up and superceding it, to have whatever charges we feel are necessary for the two trials that we are faced for in the future.

> In doing so we will examine not only all of the evidence that came against Mr. Isernio but all of the evidence that we have against Mr. Friemann.
>
> * * * *
>
> If in our judgment we believe that one of the mail fraud counts or one of the other counts is not warranted, that will be reflected in the superceding indictment. Exhibit B, pp. 2 and 5.

12. The Court granted the Government's request to have until September 5th, but warned the Government against undue delay stating:

> THE COURT: There [was] spent three months on trial with one defendant still to have pending charges as to the tax counts to be resolved at a later time. I became a grandmother during the course of the whole process. . . . It is a good thing but don't want to become a great grandmother by the time it has resolved itself. Exhibit B, pp. 5-6.

13. The Conference concluded with the setting of a briefing schedule but without a commitment from the Government, one way or the other, concerning the possible S-3. Under the briefing schedule, Mr. Friemann was to file on or before July 30, 2003, the Government's opposition was due on or before September 5, 2003, and Friemann's reply was due by September 19, 2003.

The Government Frustrated the Friemann Motion and Trial Plan

14. The possibility that the Government might supersede stifled Friemann's effort to move his case to trial or to seek to dismiss it. Dangling a *possible* S-3 that might or might not reduce the charges against him made it impossible for Friemann to file a motion seeking to dismiss S-2, an indictment on which he might not be tried. S-2 (and a motion attacking it) would have been rendered moot by S-3, and the motion, by exposing deficiencies in the government's case, would have served only to help the government clean up its presentation of S-3 to the grand jury (if, in fact, it was superseding).

15. Accordingly, for the next two months, Mr. Friemann's counsel pressed the Government to state, first and foremost, *whether* it would be filing a superseding indictment against Mr. Friemann. Counsel also urged the Government to consider dropping the charges against Mr. Friemann in their entirety. Exhibits C and D. Because the Government repeatedly ignored these requests, the proposed motion schedule was, at Mr. Friemann's request, held in abeyance by the Court, pending the Government's announcement as to whether it would or would not seek a superseding indictment.

16. The Government did not make its intentions known until September 8, 2003, 67 days after the motion scheduling conference, and three days after the Court-imposed deadline of September 5th. On September 8th, AUSA Joseph R. Conway finally advised counsel that the Government does indeed intend to file a superseding indictment, that it will do so on or about September 24, 2003, and that the proposed S-3 will likely drop the main con-

spiracy charge against Mr. Friemann while leaving the money laundering and tax charges. AUSA Conway further advised counsel that the Government does not intend to try Mr. Friemann until some time in 2004, after the conclusion of the *Isernio* retrial.

Reasons for Dismissal *With* Prejudice

17. As set forth in the accompanying memorandum of law, upon a finding that the Speedy Trial Act has been violated, the Court is required to dismiss the indictment, the only remaining question being whether that dismissal shall be with or without prejudice. As the memorandum further addresses, that decision, while guided by statutory and other factors, is committed to the sound discretion of the trial Court. I respectfully refer the Court to the arguments set forth in the memorandum of law, which I do not restate here.

18. I highlight here, however, only one factor that the Court is especially urged to take into account in the exercise of its discretion. As the Court is already aware, the prosecution of Mr. Friemann has, from the outset, been marked by strong indicia of bad faith on the part of the Government—from the highly but unnecessarily publicized pre-dawn arrest (a bullying tactic to which only he, the most peripheral defendant, was subject) to the numerous renewals of the baseless motion to disqualify Friemann's counsel—each designed as a tactical maneuver to pressure Mr. Friemann into dropping his defense. The Government's callous and disregard of Mr. Friemann's right to a speedy trial should be seen as yet another of these tactical, bad faith maneuvers. No doubt the government discerned the potential success of Friemann's pro-

posed motion (signaled, perhaps, by the Court's granting of a judgment of acquittal to Agoglia, another peripheral co-defendant) and also saw that a ruling on the motion would, as Friemann sought, have cleared the way for a prompt trial on the remaining tax charges, an event the government appears not to want to happen (Isernio, no doubt, being a much more important defendant). The Government's interference with Mr. Friemann's right to a speedy trial should be the last straw, and a reason for dismissal of the indictment with prejudice.

Dated: Uniondale, New York
September 18, 2003

Respectfully submitted,

JOSEPH W. RYAN, JR. (JR2408)

[LETTERHEAD]

JOSEPH W. RYAN, JR., P.C.
ATTORNEYS AT LAW

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BY FACSIMILE AND MAIL

July 22, 2003

Honorable Roslynn R. Mauskopf
United States Attorney
Eastern District of New York
610 Federal Plaza
Central Islip, NY 11722

Attention: AUSA Joseph R. Conway

Re: U.S.A. v. Robert Friemann
Docket No. 01-CR-1168 (JS)

Dear Mr. Conway:

This will confirm that, at your suggestion, we left a voicemail request yesterday to be advised whether the Government intends to seek a superseding indictment.

We do not want to file a motion addressed to an indictment, upon which Mr. Friemann will not be tried. It is

important, therefore, that we be advised of whether the Government will seek a superseding indictment as soon as possible, especially in view of the motion schedule requiring the filing of our papers on or before July 31, 2003.

Your prompt response would be appreciated.

Very truly yours,

/s/ JOSEPH W. RYAN, JR.
JOSEPH W. RYAN, JR.

JWR:dm

cc: Honorable Joanna Seybert

[LETTERHEAD]

JOSEPH W. RYAN, JR., P.C.
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BY FACSIMILE AND MAIL

July 30, 2003

Honorable Joanna Seybert
United States District Judge
United States Courthouse
1034 Federal Plaza
Central Islip, NY 11722

Re: *United States v. Robert Friemann, et al.*
Docket No. 01-CR-1168-S-2 (JS)

Dear Judge Seybert:

When a briefing schedule was established at our request for a motion for dismissal on behalf of our client, Robert Friemann, the Government had indicated that it intended to obtain a superseding indictment. After the Court appearance, however, we were advised to contact the Government for a confirmation on or about July 21, as to whether it would indeed seek a superseding indictment.

On July 21, 2003, we made an inquiry by voicemail and letter, but as of this date, have received no response from the Government.

We respectfully suggest that, pending the Government's confirmation as to whether or not it will seek a superseding indictment, that the briefing schedule be held in abeyance. It does not serve any purpose to file a motion addressed to an indictment, upon which Mr. Friemann will not be tried.

Thanking you for your attention, I am

Very truly yours,

/s/ JOSEPH W. RYAN, JR.
JWR:dm JOSEPH W. RYAN, JR.

cc: AUSA Joseph R. Conway, Chief
Long Island Division

[HANDWRITTEN NOTE:]
Application Granted. The briefing schedule shall be held in abeyance.

[STAMP:]

SO ORDERED:

/s/ JOANNA SEYBERT
Joanna Seybert USDJ
Dated: 8-22-03
Central Islip, NY

[LETTERHEAD]

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August 12, 2003

Honorable Roslynn R. Mauskopf
United States Attorney
Eastern District of New York
610 Federal Plaza
Central Islip, NY 11722

Attention: AUSA Joseph R. Conway

Re: U.S.A. v. Robert Friemann
Docket No. 01-CR-1168 (JS)

Dear Mr. Conway:

This will confirm that you have suggested that we contact you office on August 26, 2003 concerning its decision whether it will re-present the Friemann case to the Grand Jury.

We do urge your office to reconsider any further prosecution of Mr. Friemann.

Thanking you for your attention, I am

Very truly yours,

JWR:dm

JOSEPH W. RYAN, JR.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Docket No. 01-CR-1168(S-2)(JS)

UNITED STATES OF AMERICA

—against—

ROBERT FRIEMANN,

Defendant.

MEMORANDUM OF LAW IN SUPPORT OF ROBERT FRIEMANN'S MOTION TO DISMISS UNDER THE SPEEDY TRIAL ACT

JOSEPH W. RYAN, JR., PC
Attorneys for Defendant
Robert Friemann
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(516) 663-6515

On the brief:
Joseph W. Ryan, Jr.
John R. Quinn

Statement of Facts

The relevant facts are set forth in the affirmation of Joseph W. Ryan, Jr., dated September 15, 2003 (the "Ryan Aff.") and in the interest of economy are not restated here.

Argument

POINT I

THE INDICTMENT SHOULD BE DISMISSED WITH PREJUDICE BECAUSE THE GOVERNMENT DENIED MR. FRIEMANN HIS RIGHT TO SPEEDY TRIAL

This motion presents only two questions: 1) whether a violation of the Speedy Trial Act occurred, and 2) if so, whether the required dismissal should be with or without prejudice.

A. The Government Violated the Speedy Trial Act Because Mr. Friemann Was Not Tried Within 70 Non-Excludible Days of the *Isernio* Mistrial, and No Explicit Waiver Was Taken

There can be no genuine dispute that a violation of the Speedy Trial Act occurred. Under the Act, it is the obligation of federal prosecutors to bring a criminal defendant to trial within 70 days of the filing of the indictment or the defendant's first appearance before a judicial officer, whichever occurs last. 18 U.S.C. § 3161(c)(1). If the defendant is to be retried following a mistrial, the trial must begin within seventy days from the date the trial judge declares the mistrial. 18 U.S.C. § 3161 (e). The only extensions of the 70-day limit are the exclusions of time provided for by statute, in section 3161(h)(1) through (h)(9).

As set forth in detail in the Affirmation of Joseph W. Ryan, Jr., dated September ___, 2003 (the "Ryan Aff."), more than 70 (in fact, more than 150) non-excludible days have lapsed since the Court declared a mistrial in the *Isernio* case on April 10, 2003, and the clock continues to run: unlike other pre-trial motions, a motion addressing Speedy Trial Act rights does *not* stop the clock. *See United States v. Upton*, 921 F. Supp. 100, 103 (E.D.N.Y. 1995 (Glasser, J.), *aff'd sub nom. United States v. Dragone*, 78 F.3d 65 (2d Cir. 1996); *United States v. Didier*, 542 F.2d 1182, 1188 (2d Cir. 1977) (to stop the clock would "improperly penalize defendants for their invocation of speedy trial rules and run counter to those rules"); *United States v. Buffalo Amusement Corp.*, 600 F.2d 368, 375 (2d Cir. 1979).

None of the conceivable subsection (h) exclusions that the government might invoke applies here. First, no pre-trial motions have been filed since the Isernio trial, and even if the government were to suggest that the 67 days between the pre-trial conference on June 27, 2003 (when Friemann's counsel proposed, but never filed, a motion to dismiss) and September 5, 2003 (the government's deadline for responding to that unfiled motion) should be excluded, still, more than ninety non-excludible days have lapsed since the *Isernio* mistrial.

Second, the early continuance that the Court granted "due to complexity" was not open-ended and has expired now that the *Isernio* case has been tried. *See United States v. Upton*, 921 F. Supp. at 102 (following clear Second Circuit authority, Judge Glasser holds that exclusion for complexity under § 3161(h)(8) is not open-ended and "must be limited in time and reasonably related to the actual needs of the case").

Third, the issuance of S-3, which the Government has at last disclosed is likely to occur in late September, will not reset the speedy trial clock. As described by the government, S-3 will "clean up" the charges but not substantially alter them or add any new charges against Friemann. Thus, S-3 will inherit the clock of S-2. *See United States v. Roman*, 822 F.2d 261, 264-65 (2d Cir.), *cert. denied*, 484 U.S. 954 (1987); *United States v. Karseeboom*, 881 F.2d 604, 607 (9th Cir. 1989.)

Finally, there was no explicit waiver given by Mr. Friemann sufficient to stop the Speedy Trial clock. It is clear in this circuit that any waiver must be explicit, and "specifically tailored to address only the time periods actually being waived." *United States v. v. Cruz*, 907 F. Supp. 87, 92 (S.D.N.Y. 1995) (*quoting United States v. Didier*, 542 F.2d 1182, 1189 (2d Cir. 1976)), *aff'd*, 116 F.3d 466 (2d Cir. 1997).[1] Any waiver must also be elicited "*before* [the court] excludes time from the speedy trial clock." *Cruz*, 907 F. Supp. at 92 (emphasis in original). Thus, no implied or constructive waiver can be imputed to Mr. Friemann retrospectively.

Mr. Friemann is not here complaining about the delay resulting from Isernio's trial, from which he was severed at his own request. Instead, the speedy trial violation, and the subject of this motion, is what occurred after Isernio's trial. The severance order, to be sure, did not address the possibility of mistrial, but Mr. Friemann did not agree to be hostage to whatever number of trials the government

[1] Although *Didier* was issued when the Speedy Trial Act was passed but before it was effective and thus refers only to local speedy trial rules, the Circuit's analysis in *Didier*, as Judge Haight noted in *Cruz*, nonetheless applies to Speedy Trial Act analyses. *See Cruz*, 907 F. Supp. at 92, n. 2.

might need to resolve the case against Isernio or to whatever speedy trial waivers Isernio might make in his own interests. To the contrary, since the Isernio mistrial, as detailed in the Ryan Affirmation, Mr. Friemann has made every effort to move his case forward, while the government, by delays in responding to the letters and phone calls of counsel and in disclosing whether it would supersede, appears to have been doing whatever it could to derail that effort.[2] There can be no disputing that the Speedy Trial Act was violated.

B. The Dismissal Should be *With* Prejudice

As a sanction for the government's failure to comply with the time limit of section 3161(c), the Speedy Trial Act expressly directs that the "indictment shall be dismissed on motion of the defendant." 18 U.S.C. § 3162 (a)(2). The decision whether to dismiss with or without prejudice is committed to the discretion of the district court. *United States v. Wilson*, 11 F.3d 346, 352 (2d Cir. 1993). As a guide to a court's exercise of its discretion, in deciding whether the dismissal is to be with or without prejudice, the statute directs the Court to consider the following non-exclusive list of factors: "the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the admin-

[2] Thus Friemann's case is unlike Speedy Trial cases in which the courts have found that delay caused by the government was "ratified" by the defendant's own strategic desire to delay the trial for tactical advantage, *see, e.g., United States v. Patiwana*, 928 F. Supp. 226 (E.D.N.Y. 1996) (Block, J.), *aff'd*, 173 F.3d 845 (2d Cir. 1999), or that the defendant engaged in "gamesmanship" by consistently acceding to pre-trial delays, *see, e.g., United States v. Gambino*, 59 F.3d 353 (2d Cir. 1995).

istration of the [Act] and on the administration of justice." 18 U.S.C. § 3132 (a)(2). In addition to these statutory factors, courts also consider prejudice to the defendant. *United States v. Taylor*, 487 U.S. 326, 334 (1988).

i. *The Seriousness of the Charged Offense.*

Although the seriousness of the offenses, as charged, is not disputed, "seriousness of the offense" as a statutory factor should not weigh against dismissal with prejudice in this case because the role of Mr. Friemann in the commission of the offenses has not, and is not likely to be, established by the government. From the outset, as the Court's extensive experience with the case confirms, Mr. Friemann has been a peripheral defendant, the small fish that the Government hoped, by bullying tactics, it could pressure into a cooperation agreement.

On the BPA conspiracy count, as fully revealed in the *Isernio* trial, the Government's proof confirms that Mr. Friemann was neither the originator, procurer, nor implementer of the proposals that succeeded in awarding BPA the two health care administration contracts. None of his clients, the co-defendants Jack Blake, Mike Blake or David Blake, testified that Mr. Friemann assisted them in committing the fraud charged in the indictment, and no other witness implicated Mr. Friemann in any respect. Importantly, the Government now plans, consistent with the evidence, to drop Mr. Friemann from the principal conspiracy charge. Thus, that offense's "seriousness" cannot, under these circumstances, weigh against dismissal with prejudice.

As for the money laundering charges, based on the testimony of the Blakes in the *Isernio* trial, no reasonable juror could conclude that the $224,125 that S&F Consulting

received was the product of any criminal activity and, even assuming the existence of the conspiracy, no reasonable juror could conclude that Friemann was aware that the moneys were generated by any bribery or fraud scheme. In any event, the Government's doubts about the strength of its case against Friemann, reflected in the decision to drop Friemann from the conspiracy charge in S-3, also spills over to the money laundering charges which derive from the conspiracy charge.

As for the tax charges, brought at least in part merely to revive the motion to disqualify counsel, they were always secondary in importance to the principal conspiracy charge and they have serious flaws, including materiality and lack of tax loss (as discussed in full in Friemann's prior motion to dismiss, which the Court granted in part). In sum, the "seriousness of the offense" in this case is a less material consideration because of the serious lack of proof of Mr. Friemann's culpability in the charged offenses.[3]

ii. *The Facts and Circumstances Leading to Dismissal.*

On this factor, the reason for the speedy trial violation, courts regularly consider the "culpability of the delay-producing conduct." *United States v. Patiwana*, 928 F. Supp. at 238 (citations omitted). As the First Circuit explained, in a passage cited by Judge Block, "the appropriateness of barring reprosecution increases in relatively direct proportion to the degree of culpability which attaches." *Patiwana*, 928 F. Supp. at 238 (*quoting*, *United States v. Hastings*, 847 F.2d 920, 925 (1st Cir.), *cert. denied*, 488

[3] While S-3 is likely before the grand jury as of this writing, it would be inappropriate to furnish any greater summary of what would have been in the proposed motion to dismiss.

U.S. 925 (1988)). There is a clear consensus, in this Circuit and others, that delay "designed to gain a tactical advantage" weighs heavily in favor of dismissal with prejudice. *See, e.g., Didier*, 542 F.2d at 1187 (Second Circuit *reversing* and ordering dismissal with prejudice, noting the government's "desire to gain tactical advantage" through the delay); *United States v. Wells*, 893 F.2d 535, 539-40 (2d Cir. 1990) (dismissal with prejudice appropriate where the Government shows bad faith or neglectful attitude).

As detailed in the Ryan Affirmation, there is no doubt that the government is responsible for the delay leading to the speedy trial violation here. It was the government who failed to respond to counsel's efforts to learn whether S-3 would be filed, and that non-responsiveness appears to reflect the government's effort to thwart Friemann's potentially successful motion to dismiss, or to prevent an autumn trial on the tax counts, or both. The dilatory conduct was unquestionably "tactical" because it serves the government's dual goal of avoiding the expenditure of resources on Friemann's case (either to brief it or to try it) while preparing to retry its prime defendant (Isernio), and of not putting any of its Isernio witnesses on the stand again, before the Isernio retrial (which would supply Isernio's counsel with more ammunition for cross-examination).

iii. *The Impact of Reprosecution on the Administration of the Speedy Trial Act and on the Administration of Justice, and Prejudice to the Defendant.*

The third statutory factor is treated along with prejudice to the defendant. As Judge Glasser reasoned in *United States v. Upton*, 921 F. Supp. at 105, in which he dismissed an indictment with prejudice for a speedy trial act violation,

"the impact of reprosecution on the administration of the Speedy Trial Act and on the administration of justice must, of necessity, also embrace the unexpressed factor of prejudice to the defendant." As Judge Glasser noted, there is presumptive prejudice to a defendant when the speedy trial act is violated, and "to fail to assign significant weight to this factor would seriously undermine the administration of the Speedy Trial Act." *Id.* Thus, Judge Glasser considered this presumptive prejudice separate from any actual prejudice to the defendant in terms of his ability to prepare for trial. *Id.*

In terms of the prejudice inherent in any delay, Mr. Friemann was a subject of the Grand Jury investigation beginning in March 1999, more than four years ago, when received a subpoena for grand jury records relating to S&F. As a CPA who once enjoyed an impeccable reputation throughout the business community, he has, as a result of the charge, had to resign as a partner from his accounting firm, and been substantially hampered in his ability to pursue his profession. He has suffered acute psychological, social, professional and economic losses that will be difficult to recover. Given the record of government bad faith tactics, the pending dropping of the conspiracy charge, the paucity of proof on the other charges, and the public-interest considerations outlined below, the Court is urged to exercise its discretion in favor of bringing this prosecution to its end.[4]

---

[4] On the narrower issue of trial prejudice, both Mike Blake and Ruth Schneider are witnesses who can exonerate Mr. Friemann, based upon testimony at the Isernio trial (Blake) and the Grand Jury (Ruth Schneider), as confirmed by defense interviews of both witnesses. Both are approaching seventy, and Mike Blake, as the Court knows, is in precarious health. Because of the passage of time, the government's schedule—a trial in mid 2004—might well jeopardize, or could even sabotage, the defense.

In this case, the concerns with the administration of justice, the administration of the Speedy Trial Act, and prejudice to Mr. Friemann all militate strongly in favor of dismissal with prejudice. As courts consistently note, it is the obligation of the government to ensure speedy trial rights, *see, e.g.*, *Didier*, 542 F.2d at 1187 ("primarily responsibility for speedy trial enforcement rests primarily . . . on the government, not on the defendant"), and to dismiss with prejudice would send the necessary message to the government. Particularly in this case, as described in detail in the Ryan Affirmation, the prosecutors' thwarting of Friemann's speedy trial right is neither their first nor an inadvertent misstep, but is the most recent maneuver in a sustained pattern of bad faith tactics designed to treat Friemann like a second-class defendant. On this record, the sanction of dismissal with prejudice is entirely appropriate.

As courts also regularly observe, the purpose of the Speedy Trial Act was not only to protect defendants' rights, but to serve the public's interest in the prompt adjudication of cases. *See, e.g.*, *Patiwana*, 928 F. Supp. at 239. The public also has an interest in seeing that the vast prosecutorial powers of the government are not misused in the particular manner they were exploited here: the arrest and bullying of a peripheral defendant solely to serve the ends of convicting a principal defendant. This is not an uncommon modus operandi of the United States Attorney's Offices in this and neighboring districts, and a dismissal with prejudice here would send the necessary message that this kind of prosecution—brought more in the service of the case against a larger defendant than for its own sake—is improper. A dismissal with prejudice would send the further message that, even if the prosecution of the peripheral defendant is genuine, the government still may not be insensitive to that

defendant while it focuses on the principal defendant. By contrast, to dismiss without prejudice and allow reprosecution would serve only to validate all of the Government's bad-faith conduct to date, and to re-open the prosecutorial hunting season on Mr. Friemann.[5]

Conclusion

For all of the foregoing reasons, the Court is respectfully requested to dismiss all charges in this case against Mr. Friemann, with prejudice, for violation of the Speedy Trial Act.

Dated: Uniondale, New York
September 18, 2003

JOSEPH W. RYAN, JR., PC
EAB Plaza – 15 East
Uniondale, New York 11556
(516) 663-6515
Attorneys for Defendant
Robert Friemann

By: _____
Joseph W. Ryan, Jr. (2408)

On the Brief
John R. Quinn

* Jennifer Brewer, a member of the St. John's Law School Class of 2004, also contributed significantly to the preparation of this brief.

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[5] Alternatively, Friemann asserts, on essentially the same grounds, a violation of his constitutional, as opposed to his statutory, right to a speedy trial. *See Barker v. Wingo*, 407 U.S. 514, 530 (1972); *Doggett v. United States*, 505 U.S. 647, 650 (1992).

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Docket No. 01-CR-1168 (S-4)(JS)

UNITED STATES OF AMERICA

—against—

ROBERT F. FRIEMANN,

Defendant.

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF ROBERT FRIEMANN'S MOTION TO DISMISS UNDER THE SPEEDY TRIAL ACT

JOSEPH W. RYAN, JR., PC
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On the brief:
Joseph W. Ryan, Jr.
John R. Quinn

Robert Friemann respectfully submits the following points in reply to the Government's letter, dated October 17, 2003, opposing Friemann's motion to dismiss on speedy trial grounds.

SUMMARY OF ARGUMENT

By way of placing the government's interwoven arguments in context, a speedy trial motion presents two distinct issues—whether a violation of the Speedy Trial Act has occurred, and, if so, whether the statutorily required dismissal should be with or without prejudice.

On the first issue, the government does not come right out and assert that the Act has not been violated—in fact, they concede that Friemann has experienced a six month delay, so far—the government implies that time should be excluded post hoc for two reasons. First, the government relies on the fact that the Court designated this case as "complex" (and that "such designation was "agreed to by Friemann") and implies, without directly asserting, that that designation, made *before* the Isernio trial, allows the exclusion of the more than seven months that have lapsed *since* the Isernio mistrial was declared on April 10, 2003. But the complexity designation, made to enable the government and counsel to prepare for trial, expired with the Isernio trial. No complexity designation as to Friemann's trial has been made, nor would it be appropriate to make one. Having already prepared and tried the conspiracy case, the government does not need more than 70 days to prepare the money laundering charges (which derive from the conspiracy case), nor can the government reasonably claim that there is any special complexity in, or need for added time to prepare, the Friemann tax counts.

The government also suggests that time should be excluded, or that Friemann should not be heard to complain if it isn't, because Friemann requested a severance from Isernio. There is no statutory or decisional authority for this proposition, nor does it make any sense. Even the government concedes that when Friemann requested the severance to which the government acquiesced, neither side contemplated the possibility of a mistrial. The law plainly requires that, to be valid, waivers of speedy trial be explicit and unequivocal. The failure of either side to contemplate mistrial—a kind of latent ambiguity in the severance order—*a fortiori* means that the order is not clear and unequivocal as to speedy trial rights and cannot function as an open-ended waiver of them.

As matters stand, the government does not intend to try Friemann until after *both* Isernio's retrial on the conspiracy count *and* Isernio's tax trial—which means a trial date some time in the middle of 2004, a year and a half after severance was ordered in January 2003 (and this projection assumes that neither of Isernio's 2004 trials ends in mistrial). There is no authority for the proposition that a severance renders Friemann hostage in this manner. The severance order in this case, concededly unclear as to speedy trial rights beyond the time needed for Isernio's trial, cannot and must not operate as an implied open-ended waiver of 18 months or more of speedy trial time. Such a waiver cannot be inferred but must be explicit, and no such waiver was given.

What is clear is that substantially more than seventy days have lapsed since the Isernio mistrial.

The only remaining issue is whether the statutorily required dismissal for speedy trial violations should be final or without prejudice. As discussed in Friemann's ini-

tial motion, the statute requires the Court to consider three factors, plus prejudice. (Friemann Brief at 4-8). The government offers no argument on the first factor, the seriousness of the charges, a telling concession. While money laundering and tax fraud are of course serious offenses, the government has sent a strong signal that their case against Friemann is not as they once claimed it to be, and that Friemann is not as important a defendant as they once claimed. The government in fact has no case against Friemann on the principal conspiracy charge, which is what this prosecution has always been about.

On the other statutory factors affecting the remedy, the government argues that Friemann should not be heard to complain because he is responsible for the delay, implying, by the long quote from *United States v. Pringle*, that Friemann is somehow guilty of *Pringle*-like dilatory tactics or gamesmanship, more than merely asking for severance. But that insinuation has no basis in the record, which shows just the opposite.

In anticipation of the approaching conclusion of the Isernio trial, on March 18, 2003, Friemann's counsel submitted a letter requesting a conference concerning "the trial of Robert Friemann." The motion formally proposed at the conference on June 27, 2003 was an effort to resolve the non-tax portion of the case "with a resolution in September," in counsel's words, reflecting the hope that the autumn window (before Isernio's January trial), could be used to try Friemann on any non-dismissed counts. It is the government who is guilty of delay, having dangled the prospect of an unnecessary S-4 to stall the proposed motion.

The government's final point is that Friemann has failed to show prejudice, a ludicrous assertion both because

Friemann does discuss in his initial motion papers (Brief at pp. 7-9) the emotional, financial, professional and legal prejudice he has suffered. Plus, Friemann has suffered substantial additional prejudice in the form of S-4. The government claims that Friemann has only benefited from the delay because the fourth superseding indictment no longer charges him with participating in the principal BPA conspiracy. But the government did not need an S-4 for that—they could have dropped Friemann from the conspiracy case without going back to the grand jury. S-4 in fact helps the government, to the significant detriment of Friemann, because S-4 has been drafted precisely in order to defeat the motion Friemann proposed at the June 27 conference.

As Friemann's counsel advised the Court and the government, the purpose of the proposed motion was to show that the Court could dismiss the non-tax charges against Friemann on the basis of the revelations in the Isernio trial.[1] S-4 contains numerous factual allegations that did not appear in S-2; each of these new allegations, however, is simply the government's interpretation of a portion of the Isernio trial record. The conversion of what was formerly evidence and argument about evidence into allegations in an indictment has the effect of insulating the indictment from Friemann's proposed motion, for now, instead of having to argue about the evidence, the government can niftily hide behind the principle that "allegations of the grand jury" must be taken as true.

S-4 also works to the government's advantage and Friemann's detriment in a trial. What was merely government argument about evidence in the Isernio trial has now been cast in black and white as findings of the grand jury

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[1] See transcript of June 27, 2003 at p. 2.

in S-4, the document that the jury can hold, and so they are necessarily a probative step above prosecutor argument at trial. Of course it is also highly improper for the government to use the grand jury in this way—not to continue any genuine investigation, but to gain a tactical advantage by drafting a better indictment. In the event the Court denies this motion, Friemann expressly reserves the right to make a substantive motion attacking S-4 on the grounds of grand jury impropriety.

REPLY POINT I

FRIEMANN'S SPEEDY TRIAL CLOCK EXPIRED

Friemann's speedy trial clock expired on June 19, 2003, seventy days after the Court declared a mistrial in *Isernio*. None of the government's desperate efforts to have this Court infer a post hoc exclusion of time has merit.

A. The Former Designations of the Case as "Complex" Do Not Survive the *Isernio* Trial

The Government seeks to make much of the fact that on five different occasions before the commencement of the *Isernio* trial the Court designated this case as complex for purposes of the Speedy Trial Act, and that Friemann consented to the complex case designation. While there is no dispute that the "complex case" designations were proper when made, there is no such thing as "continuing complexity." As even the Government's letter recognizes, complexity findings must be "limited in time" and "reasonably related to the actual needs of the case." United States v. Gambino, 59 F.3d 353, 358 (2d Cir. 1995).

The rationale for this exclusion is clear. Sometimes a case's complexity "makes it necessary to grant counsel

further time to prepare in order to ensure a fair trial." Gambino, 59 F.3d at 357. Further, the Speedy Trial Act requires that, when making a complexity exclusion, a court expressly "find" and explain why the interests of justice outweigh the interests of the defense and the public in a speedy trial. *Id.*

Here, the purpose of the complexity finding—to allow the government and defense counsel time to prepare for the trial—was accomplished when Isernio was tried. No new finding of complexity was made after the mistrial, nor did either the Government or counsel for Friemann request further exclusion of time in order to prepare. Indeed, given that the principal conspiracy case has already been prepared and tried once, any request for a complexity finding as to Friemann would have to be denied. Friemann's money laundering charges derive from the case the government has already tried, so it does not give rise to any special need for additional time to prepare, and the government could not seriously contend that it needs more than seventy-days to prepare to try the relatively straightforward tax charges.

The *Gambino* case is directly on point and requires a finding that Friemann's right to a speedy trial was violated. In *Gambino*, the Court found that the speedy trial clock was violated because of the delay between the end of the trial of codefendants Gotti and Locascio and the trial of the severed co-defendant Gambino. The Second Circuit specifically rejected the Government's claim that the complexity designation entered before the Gotti trial was "continuing," and held that that designation did not extend to the subsequent trial of Gambino. 59 F.3d at 358. The Court's reasoning is instructive: "The inherent intricacy of the government's case is not a relevant factor in the pres-

ent discussion. Were Gambino's trial postponed to the next millennium the proof would still be complex," but the case was not "complex" for purposes of the Speedy Trial Act because, by virtue of having tried the first (Gotti) case, neither the government nor the defense needed additional time (beyond the 70-day limit) to prepare. *Id.*

Here, likewise, by virtue of having tried the Isernio case, the government has already climbed the lion's share of the complexity curve. However "complex" the government might claim that the proof may be, there is no longer a need for an extension of the seventy day time period to prepare.

B. By Seeking Severance, Friemann Did Not Consent to Wait, Indeterminately, For However Many Times the Government Might Try Isernio.

The Government plainly mischaracterizes the severance request and order, twice asserting that Friemann consented to have his case follow a "resolution" of the case against Isernio. (Gov. Ltr. at 4, 5). To the contrary, as the government concedes, the operating assumption was that there would be a verdict, not a mistrial, and that is what is relevant for purposes of assessing the speedy trial implications of the severance order. As discussed in Friemann's principal motion papers, waivers of speedy trial time must be explicit and specifically tailored to address only the actual time period being waived. See Friemann Brief at p. 3. Especially given the undisputed fact that mistrial was not in anyone's mind when severance was ordered, the only waiver of speedy trial time that can be said to be explicit and specifically tailored is a waiver through Isernio's trial.

Not only was the retrial of Isernio after mistrial not contemplated at the time of severance, but the third Isernio

trial now on the calendar (for *his* unrelated tax counts) was also not in the picture then. Even though some of the present delay in the scheduling of Friemann's trial is due to the request of Isernio's counsel to adjourn the retrial, it should be remembered that even that contingency—the need of Isernio's counsel for an adjournment—was not contemplated, inasmuch as the severance order was issued when the Isernio trial was about to begin. Thus, Friemann cannot be held to have waived his speedy trial rights for however many times the government might seek to try Isernio, or for however lengthy an adjournment Isernio's counsel might seek for the retrial, and for tax or whatever other charges the government might bring and try separately against Isernio.

Absent explicit discussion, at the time of severance, to the risk of mistrial, retrial, a separate tax trial, or the calendar of Isernio's counsel—or absent some statutory or judicial authority dispensing with the requirement that speedy trial waivers be explicit—the Court cannot conclude, post hoc, that Friemann intended to wait up to a year and a half for three Isernio trials before his day in court. No reported decision has attached such a high price to the right to request a severance. Indeed, the government's suggestion that delay is the price Friemann must pay because he sought severance is disingenuous. Severance was not a hardship imposed on the government, but a procedure to which the Government fully acquiesced. Furthermore, the government's actions since the Isernio trial fully ratify Friemann's position with respect to severance. The government's eventual dropping of Friemann from the principal BPA conspiracy counts on which Isernio was tried and will be retried shows that the severance was indeed appropriate: the fact that Friemann and Isernio are no longer

charged in the same counts shows that there was no basis for the government to have sought to try them together in the same trial in the first place.

In sum, neither the severance, nor the complexity designation—nor, for that matter, any other event occurring before the Isernio trial—acts as an exclusion of time under the Speedy Trial Act. More than seventy days having lapsed since a mistrial was declared in Isernio, dismissal of S-4 is required.[2] The only remaining question is whether that dismissal should be with or without prejudice.

REPLY POINT II

THE REQUIRED DISMISSAL OF S-4 MUST BE WITH PREJUDICE

A. Friemann Did Not Cause the Speedy Trial Violation

The government makes the wholly baseless suggestion that Friemann is responsible for the six month delay since the Isernio mistrial and that Friemann has engaged in dilatory tactics rising to the level of gamesmanship, dishonesty, and manipulation that support a *Pringle* waiver. See *United States v. Pringle*, 751 F.2d 419, 434-35 (1st Cir. 1984). The record, however, shows just the opposite.

Even before the Isernio trial concluded, counsel for Friemann wrote the Court requesting a status conference concerning "the trial of Robert Friemann." When the conference was held, on June 27, 2003, counsel for Friemann

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[2] As discussed in Friemann's initial motion papers (at p. 3), superseding indictments that do not add new charges do not restart the speedy trial clock. Thus, S-4 inherits the clock of S-2 and therefore, although not issued at the time this motion was filed, is now the instrument subject to dismissal.

proposed a motion seeking to dismiss the non-tax charges on the basis of revelations at the Isernio trial. [3] It was the government who sought an extended briefing schedule to accommodate both their vacation schedules and the possibility that they would issue a superseding indictment. The government then engaged in a pattern of delay in communicating its intentions to Friemann's counsel, further thwarting the proposed motion (which naturally could not be made until it was clear what indictment Friemann faced).

One particular assertion of the government concerning this post-mistrial period is especially misleading. The government argues that the "record is barren as to any request seeking a speedy trial" and in particular places weight on the absence of a request for "trial" at the June 27 conference. Gov. Ltr. at 5. As the law makes clear, it is not the defendant's obligation to ask for a speedy trial; it is the government's (and the court's) obligation to monitor the clock. 18 U.S.C. § 3161(c)(1); *United States v. Didier*, 542 F.2d 1182, 1187 (2d Cir. 1976) ("responsibility for speedy trial enforcement *rests primarily . . . on the government, not on the defendant.*"). For the same reasons the defendant ordinarily does not have the power to waive the Speedy Trial Act: there is a great public interest in a

[3] Friemann is not responsible for the fact that on March 18, 2003 he made a request for a conference and the conference was not held until June 27, 2003. It appears that until Isernio's counsel sought to adjourn the Isernio retrial from its original September date, the focus of the Government was on Isernio, its prime defendant, and Friemann was barely on the radar. But, as argued in Friemann's principal brief, that is all the more reason to dismiss with prejudice—to send a message to the government that bringing charges against a peripheral defendant in the service of a larger case, and then being insensitive to the speedy trial and other rights of that peripheral defendant, cannot be tolerated.

prompt criminal trial. *Gambino*, 59 F.3d at 360. This does not mean that defense counsel should employ "cunning strategy" to "subvert Congress's goal" of prompt trials or engage in manipulative delay tactics that trigger a Pringle waiver of speedy trial rights. But no such conduct occurred here.

As the accompanying reply affirmation of Joseph Ryan attests, in conversations before the June 27 conference Friemann's counsel made clear to the government that Friemann was seeking a prompt trial on the tax counts. Mr. Ryan advised AUSA Conway that Friemann was seeking an early trial on the tax counts, before the Isernio retrial, and sought the government's consent to drop the BPA counts, in view of the government's offer to allow Mr. Friemann to plea to a tax count in full satisfaction of the indictment.

The proposed motion was entirely consistent with and in furtherance of this objective: pressing for trial but narrowing the scope of that trial by eliminating the non-tax counts. At the June 27th conference, counsel for Friemann specifically voiced his hope that the briefing schedule for the motion would allow "some kind of resolution in early September"—the point of September being, as the government already knew from conversations with Friemann's counsel before the conference, to allow for trial on the tax counts during the autumn window, before Isernio's retrial in January 2004.

In any event, nothing Friemann's counsel could have said at the June 27th conference would have affected Friemann's speedy trial rights, for the speedy trial clock had already expired by that point. Again the Second Circuit's Gambino decision is highly instructive here. In *Gambino*, 59 F.3d at 362, the Court took note that

> Defense counsel never alerted the trial court or the prosecutor to the potential speedy trial problem. On the contrary, after the superseding indictment was returned, counsel repeatedly sought to have the trial date postponed . . . At a status conference . . . counsel specifically informed the court that "our case doesn't involve any speedy trial problems." . . . Under such circumstances, such tactics might constitute waiver-creating delay. But here the right to a speedy trial guaranteed under the Act had already been violated, and defense counsel's delaying strategy may not be used as a reason retroactively to waive this guaranteed right. . . If a violation occurred between April and August 1992 . . . counsel's later requests for a deferral in October 1992 could not undo the earlier violation.

As the *Gambino* panel Court made clear, counting the 70 days is a black and white process, without compromise: returning to the complexity issue, the trial court had, in fact, eventually made a separate complexity designation as to the second (Gambino's) trial but the Second Circuit held that that designation was not valid because it had occurred more than seventy days after the first (Gotti's) trial. *Id.* In addition, courts have made clear that any waiver of speedy trial time must be elicited "before the court excludes time from the speedy trial clock." *United State v. Cruz*, 907 F.Supp. 97, 92 (S.D.N.Y. 1995) (*emphasis added*). So again, nothing anyone could have said on June 27th could have remedied the violation of the Speedy Trial Act that had already occurred.

Here, as has been discussed, Friemann's counsel did not engage in any delaying tactics, and did not strategically stage a speedy trial act violation. But as a matter of law,

nothing counsel could have said on June 27 could have undone the violation that had already occurred.[4]

B. Friemann Has Been Substantially Prejudiced By the Delay.

Had Friemann been tried within seventy days of Isernio's mistrial, as the Act requires, he would not now be a defendant on S-4. The existence of S-4 puts him in a significantly worse position than he was in as a defendant in S-2.

Even though S-4 eliminates Friemann from the principal BPA conspiracy counts, Friemann could have been dropped from those counts without an S-4. The government could have simply moved to dismiss those counts as to him.[5]

The real effect of S-4 is that it contains, as factual allegations that did not appear in S-2, numerous instances of the government's interpretation of a portion of the Isernio trial record.[6] The conversion of what was formerly *evi-*

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[4] The procedural steps taken by counsel after the June 27th conference, then, are not relevant to assessing the cause for the delay, but to the extent they have any bearing on the overall equities, it is worth noting that counsel's request to hold the briefing schedule in abeyance was not a dilatory tactic but the only step he could take in light of the government's representation that it was re-evaluating Friemann's position in the case and might supersede to eliminate part of the case. It was worth waiting to see whether the government elected to drop the charges against Friemann altogether and, at the very least, it was impossible to file a motion attacking S-2 while aware that S-3 loomed as a possibility against Friemann.

[5] The government asserts that the grand jury failed to indict Friemann on the former Counts One, Two and other counts, but the truth of the matter is that the Government most likely did not present those counts to the grand jury.

[6] Portions of S-4 reflecting this government tactic include, inter alia, paragraphs 8, 9, 11, 12, 14, 15, 16, 21, 23, 26, and allegations throughout the tax counts. As stated earlier, Friemann expressly reserves

dence and *argument about evidence* into *allegations in an indictment* has the effect of insulating the indictment from Friemann's proposed motion. Now, in opposition to any such motion, the government can avoid having to argue about the evidence by invoking the principle that the face of the indictment—i.e., "allegations of the grand jury"—must be taken as true.

S-4 also works to the government's advantage and Friemann's detriment in a trial. What was merely government argument about evidence in the Isernio trial has now been cast in black and white as findings of the grand jury in S-4, the document that the jury can hold, and so they are necessarily a probative step above prosecutor argument at trial.

The Court is also respectfully referred to the discussion of prejudice in Friemann's initial motion papers at pp. 4-9.[7]

In sum, all three statutory factors and the non-statutory factor of prejudice militate in favor of dismissal with prejudice here. Although the Second Circuit in *Gambino* affirmed

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his right to make a substantive motion addressing S-4 in the event the Court denies this motion and shall, in any such motion, provide a comprehensive analysis with respect to S-4. For purposes of this motion we provide only the paragraph numbers for the purpose of alerting the Court to the severity of the problem. The government is not prejudiced on this motion by Friemann's failure to reveal his position further inasmuch as the government is quite well aware of what changes S-4 embodies.

[7] Finally, the Government's discussion of the constitutional right to a speedy trial need not be addressed. Friemann's motion, as the initial motion papers reflect, rests principally on the statutory right to a speedy trial. The constitutional standard in fact tolerates much longer periods of delay than the statute. Footnote Reference was made in Friemann's initial motion papers to the constitutional claim not because of any belief in the "futility" (as the government suggests) of the statutory claim, but only by way of issue preservation.

the conviction despite the speedy trial act violation on harmless error grounds, it sent a bold message to lower courts:

> [w]e hasten to add that our holding is not a signal that affirmance of a district court's failure to dismiss an indictment [for violation of the Act] will routinely follow. On the contrary, since we review the question of prejudice de novo, nondismissal in the event of a violation [of the Speedy Trial Act] will always risk nullifying an entire trial."

Gambino, 59 F.3d at 364.

CONCLUSION

For all of the foregoing reasons, the Court is respectfully requested to dismiss all charges in this case against Mr. Friemann, with prejudice, for violation of the Speedy Trial Act.

Dated: Uniondale, New York
October 27, 2003

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Attorneys for Defendant
Robert Friemann

By: _____
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On the Brief
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* Jennifer Brewer, a member of the St. John's Law School Class of 2004, also contributed significantly to the preparation of this brief.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Docket No. CR-01-1168 (S-4)(JS)

UNITED STATES OF AMERICA

—against—

ROBERT FRIEMANN,

Defendant.

REPLY AFFIRMATION IN FURTHER SUPPORT OF MOTION FOR DISMISSAL

JOSEPH W. RYAN, JR., an attorney admitted to practice in the Courts of the State of New York, hereby affirms under penalty of perjury:

1. This affirmation is submitted in reply to one of the assertions made by the government in its letter, dated October 17, 2003, opposing Robert Friemann's motion for dismissal under the Speedy Trial Act.

2. On page 5 of its letter, the government asserts that "the record is barren as to any request seeking a speedy trial" and seeks to place particular weight on the absence of an express request for trial at the conference on June 27, 2003. This is simply not the case. As demonstrated in the accompanying reply memorandum of law, it was not the defendant's obligation to ask for the speedy trial that the

Act guarantees him, nor could anything counsel have said at the June 27 conference have changed the fact that the speedy trial clock had already expired by that point. In any event, I wish here to clarify the record: Friemann unequivocally did request a speedy trial.

3. On March 18, 2003, in anticipation of the close of the Isernio trial, our office submitted a letter to the court requesting a conference concerning "the trial of Robert Friemann."

4. When the Isernio trial was adjourned from September 2003 to January 2004, I advised AUSA Joseph Conway that we were seeking to try the tax counts *before* the Isernio retrial, in the fall of 2003 and sought a conference to schedule a motion date to dismiss the BPA counts. I sought the government's consent to drop the BPA counts against Mr. Friemann to facilitate the trial, especially after it had failed to convict Isernio, the key architect of the BPA conspiracy, following a grueling three month-trial, and the government's prior plea offer to allow Mr. Friemann to end the entire criminal prosecution against him by a plea of guilty to one of the tax counts.

5. Thus, at the June 27th conference, the government was well aware, both from my March 18, 2003 correspondence and from conversations, that we were seeking to resolve the BPA counts against Mr. Friemann, and proceed as speedily as possible, for a trial on the remaining tax counts—well before the Isernio retrial.

Dated: Uniondale, New York
October 27, 2003

Respectfully submitted,

JOSEPH W. RYAN, JR. (JR2408)

[1]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CR-01-1168 CR-03-886
September 26, 2003 1:30 p.m.
United States Courthouse
Central Islip, New York

UNITED STATES OF AMERICA

—against—

ALBERT ISERNIO,

Defendant.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JOANNA SEYBERT
UNITED STATES DISTRICT JUDGE

Appearances:

For the Government: ROSLYNN MAUSKOPF
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100 Federal Plaza
Central Islip, New York 11722
BY: JOSEPH CONWAY
MICHAEL CORNACCHIA
Assistant United States Attorney

For the Defendant: JOHN WING, ESQ.

Court Reporter: Mary Ann Steiger
100 Federal Plaza
Central Islip, New York 11722
(631) 712-6101

Proceedings recorded by mechanical stenography, transcript produced by computer.

[2]

THE CLERK: For arraignment on 01-1168 and status conference on 03-886, United States versus Isernio.

Counsel, state your appearances.

MR. CONWAY: Joseph Conway, Michael Cornacchia, Kevin Mulry and Collin O'Donnell for the government.

MR. WING: John Wing for Mr. Isernio.

THE COURT: Good afternoon, Mr. Isernio.

And, Mr. Wing, on behalf of your client, you're waiving a reading of the charge and, of course, entering a plea of not guilty?

MR. WING: That's correct, your Honor.

THE COURT: This is substantially less, this particular indictment, than the one that was submitted to the jury at the end of the trial this past year.

Additionally, I would note there's now pending a new indictment. So, I'm essentially attempting to determine whether or not—whether I want to go with the now reduced indictment on the previous mistrial or just start with the new charges which are contained in CR-03-886, and those charges are quite abbreviated in regards to the allegation certainly, and deal with the discrete income tax returns in 1997 and '98 and, in addition, to structuring charges.

I believe that the basis for the indictment certainly would be the testimony that Mr. Isernio gave in [3] the proceeding before the Court. I'm somewhat hesitant to change, but I'm open to any suggestions. I realize that the Government's case will take at least a month even with the new reduced indictment approximately and I don't know how long the defendant's case will take, if he intends to testify again or present witnesses in addition to those presented by the government.

MR. CONWAY: For whatever help it might be, your Honor, even with the reduced version of the indictment that ended in the mistrial, we still expect to call about 20 witnesses give or take a couple on each side.

I think the Court's probably right; four, five weeks for the Government's case. With all due respect to Mr. Wing, I can't determine how long his cross will be, whether it will be shorter or longer than the first time around. That's a factor that has to be considered as well.

As far as the newer indictment, that is a much shorter case. We estimate five, six witnesses.

THE COURT: Tops two weeks?

MR. CONWAY: Yes. I don't think it's a type of case that requires extensive cross-examination. It's document heavy. I think two weeks is fine.

THE COURT: I don't think there's a whole lot of discovery that would be necessitated.

[4] MR. CONWAY: We provided Mr. Wing discovery on September 11. We sent him a letter with a bunch of the documents that we used in order to indict the case, some of which he has from the first time around, but some new ones.

As far as the government is concerned, we're ready for trial in January whether we're coming in to try a tax case or the old indictment. We will defer to what the Court wishes to do.

THE COURT: Mr. Wing, I also am cognizant of the fact that your trial schedule has driven the scheduling of this Court and I cannot permit that to continue.

I've gotten a number of calls. And I'm certainly not blaming you. I'm telling you what some of my dilemmas have been.

I attempted to try this case in September. I called Judge Martin based upon your representation that you would be trying a case before him.

This was back in June when we met with regards to scheduling the trial, and at that time he assured me that you would be on trial. A new judge would be located in Westchester, that Judge Martin wasn't going to be trying it. Since that time, Judge Martin has been retired. There was no judge sent to Westchester, and now I have Judge Amon from the Eastern District calling to [5] see what your trial schedule is because you have some other matters that—

MR. WING: That's after this.

THE COURT: I want to schedule this and get both indictments out of the way.

In order to facilitate this I think it would be a lot more efficient to try the later case first and then schedule the mistrial shortly thereafter.

MR. WING: Your Honor—

THE COURT: I do have other cases.

MR. WING: I know you do, Judge.

I think we had been planning to try the retrial first. And I would be happy to consult with my client, but I think initially my instinct is since that's the way we were geared up, that's what I would propose to do unless there was some commitment from the government if we tried the shorter case first that the mistrial, the second case, wouldn't have to go.

THE COURT: The government can't make that kind of commitment. I run the courtroom. I'm sure you would like to tell me when I can try a case too. I can only answer to a higher authority.

MR. WING: They have discretion to dismiss if they feel it's appropriate. That's what I was thinking of.

[6] THE COURT: I don't see that coming.

I think it would be wise to try the charges that are later in time simply to get those out of the way and then I will give you most likely a two week break and you'll go right into the other case.

Any motions that you want to make on the new indictment, you can do those within—how long a time do you need to file the motion?

MR. WING: I was going to ask for 30 days.

MR. CONWAY: Not knowing what the motions will be, if we can take three weeks to respond. If we can do it earlier, we will.

THE COURT: What motions do you contemplate?

MR. WING: I don't know that I'll have—I want to renew motions that were made the first time around.

THE COURT: That's the other indictment. I'm doing the motions on the new charge.

MR. WING: I understand, Judge. Some of them might be similar motions, I'll put it that way.

THE COURT: Similar motions on it, okay.

MR. WING: I don't know that I have any specific motions at the moment. I just got the indictment two days ago.

THE COURT: Not the new indictment.

MR. WING: Yeah, the new one. I'm sorry, you're [7] talking about the tax indictment.

THE COURT: Yes.

MR. WING: On that one, Judge, I would ask 30 days for motions. Right now, I don't know that I would be making any motions on that one.

THE COURT: Fine. I'll give you 30 days. October 27th.

MR. WING: That's agreeable, your Honor.

THE CLERK: Three weeks is November 17 for the government.

MR. CONWAY: That's acceptable.

THE CLERK: A week for reply.

MR. WING: Thank you.

MR. CONWAY: Your Honor, in lieu of the possibility of Mr. Wing not filing any motions, when we arraigned the defendant on the tax case on August 12th, there was a waiver of speedy trial up until September 10th, which was when the conference was originally scheduled for, and so I would ask for another waiver of excludable delay be entered between now and the January session unless there's motions filed.

MR. WING: We will consent, your Honor.

THE COURT: Consent is noted. Speedy trial time waived on that.

In the interim, if you can resolve the mail [8] fraud, the retrial of those counts that remain and perhaps enter into some stipulations, that might expedite the amount of time you will have to spend, but what I plan on doing is tentatively set—barring granting of your motion, Mr. Wing, set this case for trial on the date of January 6th. That's the date we were scheduled for jury selection. We can do it on the 5th. I don't contemplate a separate panel. I'm not going to use questionnaires on two counts of false filing and structuring.

MR. WING: I hate to say it, here's the problem. That is, we have all this publicity about Al Isernio. He's a household word out there.

THE COURT: Not in my house.

MR. WING: Probably especially in your house. I'm teasing.

I think because of that a questionnaire would make sense. Absent the publicity, I wouldn't have the concern. There's no way we can avoid it and I think we really do need to have the attention paid to screen out people who have been exposed. There have been a lot of people exposed, a lot of press. Everything Mr. Isernio does makes the press. The tax case was indicted. There was particulars on that and the connection was made in Newsday to the bigger case.

THE COURT: Mr. Wing, my impression of the [9] Newsday coverage in this case was that it was probably limited

to no more than 10 articles and it appears that Newsday at the present time is much more interested in the goings-on in Suffolk County with regard to any problems they have with county employees and health coverage, health insurance coverage.

That having been said, we have a lot less defendants in this case at this time. We have a very limited indictment and I'm going to have a special panel called in.

I will thoroughly examine the jurors, as I did the last time, and I will certainly ask the question that was requested of me about who do you admire the most, what famous person.

I will give a lot of detail to ascertaining what, if any, biases or prejudice or prior knowledge any of the jurors have with regard to Mr. Isernio, Nassau County, BPA, but I don't see the need now because there are no political figures, if you will, mentioned and time is passing.

It's a new administration in Nassau. There's a lot of different factors that weren't that prevalent when this investigation and indictment was rendered several years ago. Certainly those aren't in any way, shape or form in the structuring and tax counts so I don't think we **[10]** will have that much of a problem. I'll take whatever motions you have and rule on them accordingly.

MR. CONWAY: We agree with the Court on the jury selection date.

THE COURT: January 5th for jury selection and go straight to trial, and thereafter I'll give you a two week break and start the retrial of the other case.

That will put you into a schedule where you can meet your obligations with regard to Judge Amon, and I'm sure

that the retrial will be substantially shorter than the first case.

MR. WING: Mr. Conway indicated that's what he thought, although the indictment itself seemed to me other than losing Mr. Friedmann basically the same.

THE COURT: It's a lot less. Mr. Tepper is out. He was out during the course of the trial. You don't have that union overlay allegation. You don't have the conduit with regard to AZL.

MR. WING: That's Friedmann.

THE COURT: I know it's Friedmann. You don't have a lot of problems that you have with Mrs. Schneider.

MR. CORNACCHIA: There will be less witnesses.

MR. CONWAY: Even the counts we charge, your Honor, we—

[11] THE COURT: A lot of the factual allegations are gone.

MR. WING: Judge, the idea of trying the tax case first is absolutely new to me and obviously we will do whatever your Honor requires.

I would like the opportunity to think about it a little. If I have another suggestion, to submit it to the Court.

THE COURT: You can only suggest, but that's your trial schedule and that's what you should represent to any other judges that might be looking for you.

MR. WING: One other thing, Judge.

With respect to the new indictment in the old case, may we have 30 days for motions on that one?

THE COURT: Sure.

MR. WING: I guess we could keep the same schedule that you set with respect to replies and the government's answer and reply brief.

THE COURT: It may very well be that you don't need to make motions on that now, that many of the aspects of the case are gone.

MR. CONWAY: I would assume any motions that may be made will be new motions and not a rehash of motions that were made and denied previously.

MR. WING: I think I probably would be required [12] to renew any motion that would be equally applicable to the new indictment and I'm sure there are some. For example, the publicity motion.

THE COURT: You made that the last time and it was the primary motion in addition to others, but you made that one.

MR. WING: To the extent I would renew all the motions, I think to the extent possible I would simply try to refer to them and incorporate the old papers.

THE COURT: Incorporate the old papers. If there's any new law, you can give it to me, but you don't have to refile papers.

MR. WING: Judge, could I ask, you may recall that in August of 2002 you came down with an order covering various discovery issues, time limits by which we were to get the government's witness list, the government's exhibits, the 404(b), so I would ask that that same time schedule be given for both of these cases.

THE COURT: You're not getting any new stuff, are you, in terms of the old indictment?

MR. CONWAY: In terms of the old indictment as of right now, your Honor, there is no—

THE COURT: Let's not use the term old indictment. We have the old case.

MR. CONWAY: There's no new witnesses. [13] Everybody who was scheduled to testify when we do the trial will have testified in the first case.

THE COURT: Any new 3500 material?

MR. CONWAY: Only their testimony in the trial.

MR. WING: I have that.

THE COURT: Additionally, any new interviews, you have to provide that. Additionally, any Brady material that may have arisen as a result of the proceedings and the passage of time, you have to provide that.

Anything else?

MR. WING: Your Honor, what I was looking for, to the extent they're cutting the case down and they're calling only two-thirds of their witnesses, it would be helpful to the defense to know which witnesses it's going to be so we don't waste our time. And the same thing with exhibits.

If I can have the same time schedule you set in that order, sometime in August of 2002, I would appreciate that for both of the cases.

MR. CORNACCHIA: At that time, Judge, there was eight defendants. I think that's why your Honor asked for early production of everything.

THE COURT: I know, Mr. Cornacchia, but I would like to make this second trial in terms of the old case as [14] painless as possible for both sides, including the defendant and

including the government. You'll get the paperwork together. You know who your witnesses are going to be. There's no reason to suggest that you wouldn't have that information available by December 15.

MR. CONWAY: That's fine.

THE COURT: On the old case. On the new indictment, on the tax filings and the structuring, that you're going to provide the 3500 material by December 15. It's a straight tax case, no issue here of obstruction or hurting witnesses.

MR. CONWAY: No.

THE COURT: All the forms in terms of filings I assume, Mr. Wing, your client has access to them. And if the government has anything different, make sure you provide those materials to defense counsel.

MR. CORNACCHIA: Thank you, Judge.

MR. CONWAY: Thank you, Judge.

THE COURT: The second trial will be two weeks after that.

THE CLERK: February 3rd.

THE COURT: What I will schedule, Mr. Wing, is to have a special panel for the second trial and put that down for February 3rd.

MR. WING: Very well, with the proviso if the **[15]** tax case goes longer, I'll have the two week break in between?

THE COURT: Yes. No. We're starting the second trial February 3rd. The tax case is not going to go longer than a week.

MR. WING: I think it might, Judge.

THE COURT: It might. Then you'll have less than two weeks to start up on the second trial. As long as the jury renders a verdict in that case, then we will have two weeks, provided there's two weeks in between. We're starting the retrial on February 3rd.

MR. WING: Very well.

THE COURT: We're starting the tax case on January 5th.

MR. CORNACCHIA: Thank you, Judge.

MR. CONWAY: Thank you, your Honor.

(Proceedings concluded.)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

01-CR-1168 (S-4) (JS)

UNITED STATES OF AMERICA,

—against—

ROBERT F. FRIEMANN,

Defendant.

ORDER

Appearances:

For United States: Joseph R. Conway, Esq.
Office of the United States Attorney
Long Island Federal Courthouse
100 Federal Plaza
Central Islip, New York 11722-4438

For Defendant:
Robert F. Friemann: Joseph W. Ryan, Jr., Esq.
Joseph W. Ryan, Jr., P.C.
190 EAB Plaza, 15th Floor
Uniondale, NY 11556-0190

SEYBERT, District Judge:

Pending before this Court is a motion made by the Defendant, Robert F. Friemann ("Friemann" or "Defendant"), under the Speedy Trial Act. See 18 U.S.C. § 3162. The Defendant seeks an order of dismissal because he alleges that the Government has failed to provide a trial within the 70 day time limit provided by the Speedy Trial Act. As discussed below, the Court is not persuaded by the arguments presented and, therefore, will not grant an order of dismissal to Friemann.

BACKGROUND

The parties to this case are familiar with the complex and detailed factual background of this case. Therefore, only the most salient facts, as relevant to the instant motion, are presented herein.

Friemann was one of several named defendants in a large conspiracy, bribery, money laundering, and tax evasion case involving Nassau County. An initial status conference was held on November 9, 2001, during which time, with consent of all parties, the case was designated as complex. Approximately two months later, on January 24, 2002, the grand jury added additional charges in a superceding indictment. On February 1, 2002, all the defendants were arraigned and the trial was again designated as complex with the consent of all the defendants.

On March 27, 2002, the grand jury returned a second superceding indictment which added yet more charges and another defendant. All defendants were arraigned on this indictment on April 5, 2002 and again consented to a complex case designation. A status conference with all defendants was held on May 10, 2002 and at that time motion

and trial dates were set. Pursuant to this conference, the trial was to begin on November 4, 2002.

Many of the defendants, including Friemann, filed motions seeking various relief after the May 10, 2002 conference. On October 10, 2002, another conference was held where it was agreed that due to the complexity of the case, including the many pending motions, the trial would be adjourned until January 6, 2003. During December 2002 and January 2003, several of the defendants pled guilty. On January 13, 2003, a trial began against Friemann, Albert Isernio, and Michael Agoglia. Friemann, with the Government's consent, severed his case from the other defendants at the incipient phase of the trial.[1] The Government's consent was conditioned on one trial against Friemann on these charges and on the other tax violations which had previously been severed from the main case. Friemann had accepted this condition and knew that his trial would occur *after* a resolution of the case against Isernio and Agoglia.

The Isernio and Agoglia trial resulted in a hung jury which caused this Court to declare a mistrial on April 10, 2003. The case against Agoglia was dismissed pursuant to Rule 29 of the Federal Rules of Criminal Procedure. A second trial against Isernio was scheduled for September 15, 2003, however, due to scheduling conflicts, Isernio's counsel requested to have the trial postponed. This request was granted. In January 2004, the Government proceeded to trial against Isernio regarding the charges of structuring and tax evasion under Indictment 03-CR-866 (S-1), which

[1] Although Friemann did participate in approximately three days of this trial, the trial was still in its very early stages because jury selection was still taking place.

resulted in a jury verdict against Isernio on January 21, 2004. Thereafter, Isernio pled guilty to the charges against him under Indictment 01-CR-1168 (S-4). Therefore, all charges against Isernio were resolved and now the Government can proceed against Friemann as originally contemplated by the parties.

SPEEDY TRIAL ACT

The speedy trial act provides that a defendant must be tried within 70 days of either the filing of an indictment or the defendant's first appearance on the charge before a judicial officer, whichever is later. See 18 U.S.C. § 3161(c)(1). Importantly, however, the proper computation of this time period excludes certain periods of time. See 18 U.S.C. § 3161(h). The statutory language is unambiguous with regard to the periods of time which are to be excluded. Id. Specifically, section 3161(h)(8) states that a district court may grant a continuance, and accordingly any resulting period of delay, from the 70 day time period of the Speedy Trial Act, and certain factors which the court may consider are listed within the statute. The most important factor, for purposes of this motion, is the district court's consideration of whether the case is "complex." See 18 U.S.C. § 3161(h)(8)(ii).

ANALYSIS

This Court finds Friemann's arguments regarding a violation of the Speedy Trial Act not persuasive. This Court has designated this case, from its incipient stages, as "complex." This designation was with the consent of all the defendants including Friemann. Friemann was present on October 10, 2002 when the Court again designated this

case as "complex." It is troubling to the Court that Friemann would knowingly participate in this Court's proceedings, and the resulting designations as complex, and then later claim that he was not receiving a speedy trial. This issue, if in fact it is an issue, should have been raised each time this Court was making a determination that the case was complex. However, not only did Friemann not raise a speedy trial issue at any time, he participated and thereby consented to the designation of this case as complex. For this reason alone, Friemann's motion under the Speedy Trial Act should be denied.

Furthermore, and equally troubling, it was Friemann's motion to sever which exacerbated his delay. After three days of jury selection in January 2003, Friemann renewed his motion to sever his trial from that of the remaining defendants. The Government consented to Friemann's motion and this Court granted the motion noting that Isernio's trial may resolve certain matters which would effect Friemann's trial and thereby be more efficient. The mistrial of Isernio and resulting retrial was not a consideration when the severance of Friemann's trial occurred. However, the root cause of any delay caused by Isernio's mistrial is not to be blamed on the Government, rather the delay that was caused by Isernio's mistrial is directly attributable to Friemann's motion to sever. If Friemann had not requested to sever his trial from Isernio, he would not have had his trial delayed by the Isernio mistrial. This is another ground upon which this Court could deny Friemann's speedy trial motion.

Moreover, in Friemann's motion he cites *United States v. Patiwana*, 928 F. Supp. 226 (E.D.N.Y. 1996), *aff'd* 173 F.3d 845 (2d Cir. 1999), as a case that this Court should consider for the "culpability of the delay-producing con-

duct." This Court is not persuaded. There were no tactics utilized by the Government to try and gain a tactical advantage over Friemann. *See id.* at 238. If anything, the Government's consent to allowing a severance prejudiced their case. If in fact, as Friemann asserts, the Government's case against him is much weaker than against the other defendants, a severance only served to prejudice the Government. A Government with improper motives would want to maintain one prosecution against all the defendants hoping that "spill-over" prejudice would compel the jury to convict as to all defendants.

Finally, this Court has considered Friemann's alternative argument that a constitutional violation has occurred because of an alleged failure to receive a speedy trial. Again, the Court is not persuaded that a violation occurred regarding Friemann's trial. In *Barker v. Wingo*, 407 U.S. 514, 530 (1972), the Supreme Court ruled that four factors are to be considered in determining whether there has been a violation of a defendant's constitutional right to a speedy trial. The *Barker* factors are (1) length of the delay, (2) reason for the delay, (3) defendant's assertion of his right, and (4) prejudice to the defendant. In *Barker*, the Supreme Court held a condition precedent to an analysis of the factors was a delay of time. *See id.* In the instant case, this Court does not believe there has been a delay of time. However, as the Government points out, even assuming that a delay does exist it is not a lengthy delay. Depending on how this Court were to calculate this alleged delay it could perhaps be as long as one year. However, even one year is still within Second Circuit precedent regarding acceptable periods of delay. Specifically, the Second Circuit has held that periods of more than two years did not amount to constitutional violations. *See United States v. McGrath*, 622 F.2d

36, 41 (2d Cir. 1980). This Court does not find any constitutional violation in the instant situation.

CONCLUSION

For all of the reasons discussed above, this Court DENIES the Defendant's motion to dismiss. As the prosecution against Isernio is now complete, Defendant's counsel is advised that, subject to Defense Counsel's availability, this Court will be able to conduct Friemann's trial in May 2004.

SO ORDERED.

/s/ JOANNA SEYBERT
Joanna Seybert, U.S.D.J.

Dated: Central Islip, New York
February 26, 2004

[1]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CR-01-1168 (JS)
March 29, 2004 10:30 a.m.
United States Courthouse
Central Islip, New York

UNITED STATES OF AMERICA

—against—

ROBERT FRIEMANN,

Defendant.

TRANSCRIPT OF TELEPHONE CONFERENCE BEFORE THE HONORABLE JOANNA SEYBERT UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Government: ROSLYNN MAUSKOPF
United States Attorney
100 Federal Plaza
Central Islip, New York 11722
BY: JOSEPH CONWAY, AUSA

For the Defendant: JOSEPH RYAN, ESQ.
EAB Plaza – 15 East
Uniondale, New York 11556

Court Reporter: Perry Auerbach
100 Federal Plaza
Central Islip, New York 11722
(631) 712-6103

Proceedings recorded by mechanical stenography.
Transcript produced by computer.

[2]

THE CLERK: Calling United States versus Friemann Mr. Ryan, the judge is on the

MR. CONWAY: Joseph Conway for the government.

THE COURT: Mr. Ryan and Mr. Conway, the purpose of this rather quickly set date is to, first of all, make a ruling on the motion with regard to reconsideration of the Court's decision denying a dismissal of the indictment on the basis of speedy trial violations by the government.

Additionally, I want to schedule with counsel the jury selection in this case, and that will, of course, lead me to advise you that I have prepared a written order denying your motion, Mr. Ryan, for dismissal on the basis of a speedy trial violation.

While I agree with you that complexity certainly is not the sole determination here with regard to whether or not Mr. Friemann agreed to complexity at any point, but rather, certainly through the type of the severance, complexity was a basis for exclusion of speedy trial time. I think the record is clear that Mr. Friemann indeed consented and made an agreement with the government that as a condition of the severance, his trial will follow the trial of Mr. Isernio, and until Mr. Isernio's case was completed, that the speedy trial time clock on behalf of Mr. Friemann would not begin until that point.

There clearly was no longer the prospect of a [3] trial against Mr. Isernio as of January 27, 2004.

So the Court calculates 70 days from that date. That's when I make the determination that the speedy trial clock begins.

So with respect to your motion for reconsideration, that motion is denied, and I'll sign the order on that.

As far as the speedy trial time goes, my determination would be next Tuesday, that's April the sixth, that the government would be to be ready and proceed to trial.

Mr. Conway, is the government ready?

MR. CONWAY: Yes, your Honor.

THE COURT: I'm prepared to select a jury today.

MR. CONWAY: Yes, your Honor.

I have, if I may, two responses. The simple response is yes, we are ready, and we'll go at any date the Court sets. I would also add in terms of your speedy trial calculations, beginning on January 24th of this year.

THE COURT: Wasn't it January 27th that he entered a plea? Mr. Isernio?

MR. CONWAY: That's correct. From that time period to the present, I think would be excluded. The defendant's motion for reconsideration would stop the [4] [MISSING TEXT?] which is today.

So I would take out, I don't know the exact date he filed a motion for reconsideration, but I think it was some three weeks ago or so. So I think there would be 15 or 25 days there that would exclude the clock. Needless to say, the government is ready whenever the Court and Mr. Ryan are.

THE COURT: Mr. Ryan, what would you like to say?

MR. RYAN: Well, your Honor put down in its decision that this case was going to be tried in May.

THE COURT: I realize that.

MR. RYAN: And we're available in May.

THE COURT: You are now. Great. Okay.
What's your position on the exclusion of the period of time from March 3, 2004 until today?

MR. RYAN: We obviously disagree with your Honor's determination on calculation.

THE COURT: I'm not suggesting that you change your calendar. What I'm saying is January 27th as far as I'm concerned is the date that the speedy trial clock runs.

MR. RYAN: All right.

THE COURT: Now, my question to you, Mr. Ryan, **[5]** is what's your position with regard to your motion for reconsideration which was received on March 3, 2004? Are you saying that that did not impact on whether the government should be ready during that period of time? If you are, that's fine.

MR. RYAN: The motion for the speedy trial did not delay the clock. But to get down to the practicalities of this, I got a phone call on Friday to have this conference today.

THE COURT: Yes.

MR. RYAN: And as your Honor knows, my other commitments prevented me from being available for the trial.
We'll be ready for trial.

THE COURT: All right.

MR. RYAN: If I can be able to pick the jury the first week in May?

THE COURT: Can you do it before May?

MR. RYAN: I think we can, yes. I think we can probably do it the last week in April.

THE COURT: All right. Let me double-check with Charlie for a moment and let me also see when the return dates are.

THE COURT: April 12. Does that work for everyone?

[6] MR. RYAN: Judge, I was going to ask you for April 19th or 26th.

THE COURT: I'm just trying to line it up with return dates. The 26th I'm going to be away. No. I'm not going to be away. I change that. Yes. I'll be here on the 26th.
Is that a return date?

THE CLERK: Yes.

MR. RYAN: I request the 26th.

THE COURT: All right. Mr. Ryan, so we're perfectly clear on the record, as to the period of time between today, when the government has indicated they're ready to go to trial, and April 26th, you're waiving your rights in terms of speedy trial.

MR. RYAN: I think your Honor can make that decision without the necessity of a waiver.

THE COURT: I'm telling you I can try the case starting tomorrow.

MR. RYAN: The reality is that the government is not ready tomorrow.

THE COURT: I don't care what you think reality is here, Mr. Ryan. Mr. Conway has made a representation he's ready to try the case. If you want to come in tomorrow, I'll have the jurors available and I'll do jury selection. And if the government is not ready, then I'll [7] dismiss the case.

MR. CONWAY: We're prepared, your Honor.

MR. RYAN: I think that we ought to come in tomorrow, Judge.

THE COURT: Okay, fine. We'll start jury selection tomorrow at 9:30 and any particular questions you want in terms of voir dire, please let me know.

MR. RYAN: Thank you.

THE COURT: And I'll see you folks tomorrow then.

MR. RYAN: Your Honor, you'll do jury selection tomorrow and openings the following Monday.

THE COURT: Yes. Is that agreeable? Actually the following Monday is Passover, so what we can do then is you can start your openings after jury selection. There's no reason to put it over until Monday.

All right, gentlemen. I'll see you tomorrow at 9:30. Have a good day.

MR. RYAN: Thank you.

THE COURT: You're welcome.

(Matter concluded.)

AO 245B (Rev. 12/03) Judgment in a Criminal Case
Sheet 1

UNITED STATES DISTRICT COURT

EASTERN District of NEW YORK

Case Number: CR 01-1168 (JS) Deft. #7
USM Number: 60120-053

UNITED STATES OF AMERICA

v.

ROBERT FRIEMANN

(AUSA Joseph Conway)

Joseph Ryan, Esq.
Defendant's Attorney

JUDGMENT IN A CRIMINAL CASE

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

X was found guilty **5 of fourth superseding indictment** on count(s) after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense	Count
26 USC 7206(1)	MAKING A FALSE INCOME TAX RETURN	4-15-1999	5sss

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

X The defendant has been found guilty on count(s) **1sss, 2sss, 3sss, 4sss, 6sss, 7sss, 8sss**

X Count(s) of all pending indictments ☐ is
X are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

Sep. 17 & 28, 2004
Date of Imposition of Judgment

/s/ JOANNA SEYBERT
Signature of Judge

JOANNA SEYBERT, U.S.D.J.
Name and Title of Judge

Sep. 29, 2004
Date

A TRUE COPY, ATTEST: ROBERT C. HEINEMANN, CLERK

By: /s/ [Illegible], DEPUTY CLERK DATED: 9/30, 2004

AO 245B (Rev. 12/03) Judgment in a Criminal Case
Sheet 4—Probation

DEFENDANT: ROBERT FRIEMANN
CASE NUMBER: CR 01-1168 (JS)

PROBATION

The defendant is hereby sentenced to probation for a term of: **3 YEARS**

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of placement on probation and at least two periodic drug tests thereafter, as determined by the court.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

X The defendant shall not possess a firearm, destructive device, or any other dangerous weapon. (Check, if applicable.)

☐ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall register with the state sex offender registration agency in the state where the defendant

resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of probation that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

AO 245B (Rev. 12/03) Judgment in a Criminal Case
Sheet 4A—Probation

Judgment—Page 3 of 5

DEFENDANT: ROBERT FRIEMANN
CASE NUMBER: CR 01-1168 (JS)

ADDITIONAL PROBATION TERMS

THE DEFENDANT SHALL MAKE FULL FINANCIAL DISCLOSURE TO THE PROBATION DEPT. AND PAY THE TAXES DUE.

AO 245B (Rev. 12/03) Judgment in a Criminal Case
Sheet 5—Criminal Monetary Penalties

Judgment—Page 4 of 5

DEFENDANT: ROBERT FRIEMANN
CASE NUMBER: CR 01-1168 (JS)

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$ 100.00	$ 1,000.00	$ 3,082.00

☐ The determination of restitution is deferred until ____ _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination

X The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
I.R.S. (Restitution for N.Y. State taxes cannot be imposed, per Hughes -v- U.S. 495 U.S.411)		$3,082.00	
TOTALS	$ _____	$ 3,082.00	

☐ Restitution amount ordered pursuant to plea agreement $ _____

X The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

- ☐ the interest requirement is waived for the ☐ fine ☐ restitution.
- ☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

---

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

AO 245B (Rev. 12/03) Judgment in a Criminal Case
Sheet 6—Schedule of Payments

Judgment—Page 5 of 5

DEFENDANT: ROBERT FRIEMANN
CASE NUMBER: CR 01-1168 (JS)

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A X Lump sum payment of $ 100.00 due immediately, balance due

□ not later than _____, or
X in accordance □ C, □ D, □ E, or X F below; or

B □ Payment to begin immediately (may be combined with □ C, □ D, or □ F below); or

C □ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $_____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D □ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $_____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E □ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F X Special instructions regarding the payment of criminal monetary penalties:

RESTITUTION/TAX PAYMENT OF $3,082.00 DUE WITHIN 60 DAYS.

FINE OF $1,000.00 DUE WITHIN 60 DAYS.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

AO 245B (Rev. 12/03) Judgment in a Criminal Case
Attachment (Page 1)—Statement of Reasons

DEFENDANT: ROBERT FRIEMANN
CASE NUMBER: CR 01-1168 (JS)
DISTRICT: E.D.N.Y.

STATEMENT OF REASONS
(Not for Public Disclosure)

☐ **THE COURT ADOPTS THE PRESENTENCE REPORT AND GUIDELINE APPLICATIONS WITHOUT CHANGE.**

OR

X **THE COURT ADOPTS THE PRESENTENCE REPORT AND GUIDELINE APPLICATIONS BUT WITH THESE CHANGES: (Use Page 3, if necessary.)**

SEE ATTACHMENT **Page 4**

☐ **Chapter Two of the U.S.S.G. Manual** determinations by court (including changes to base offense level or specific offense characteristics):

☐ **Chapter Three of the U.S.S.G. Manual** adjustment determinations by court (including changes to victim-related adjustments, role in the offense, obstruction of justice, multiple counts, or acceptance of responsibility):

☐ **Chapter Four of the U.S.S.G. Manual** determinations by court (including changes to criminal history category or scores, career offender, or criminal livelihood determinations):

☐ **THE COURT ADOPTS THE PRESENTENCE REPORT WITH THESE COMMENTS OR FINDINGS** (including comments or factual findings concerning certain information in the presentence report that the Federal Bureau of Prisons may rely on when it makes inmate classification, designation, or programming decisions. Specify court comments or findings, including paragraphs in the presentence report.) (Use Page 3, if necessary.)

GUIDELINE RANGE DETERMINED BY THE COURT (BEFORE DEPARTURES):

Total Offense Level: 8

Criminal History Category: 1

Imprisonment Range: 0 to 6 months

Supervised Release Range: _____ to _____ years

Fine Range: $ 1,000 to $ 10,000

☐ Fine waived or below the guideline range because of inability to pay.

X **THE SENTENCE IS WITHIN THE GUIDELINE RANGE, THAT RANGE DOES NOT EXCEED 24 MONTHS, AND THE COURT FINDS NO REASON TO DEPART.**

OR

☐ **THE SENTENCE IS WITHIN A GUIDELINE RANGE, THAT RANGE EXCEEDS 24 MONTHS, AND THE SPECIFIC SENTENCE IS IMPOSED FOR THESE REASONS:** (Use Page 3, if necessary.)

AO 245B (Rev. 12/03) Judgment in a Criminal Case
Attachment (Page 2)—Statement of Reasons

DEFENDANT: ROBERT FRIEMANN
CASE NUMBER: CR 01-1168 (JS)
DISTRICT: E.D.N.Y.

STATEMENT OF REASONS
(Not for Public Disclosure)

RESTITUTION DETERMINATIONS

Total Amount of Restitution: $ 3,082.00

- ☐ For offenses for which restitution is otherwise mandatory under 18 U.S.C. § 3663A, restitution is not ordered because the number of identifiable victims is so large as to make restitution impracticable under 18 U.S.C. § 3663A(c)(3)(A).
- ☐ For offenses for which restitution is otherwise mandatory under 18 U.S.C. § 3663A, restitution is not ordered because determining complex issues of fact and relating them to the cause or amount of the victims' losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim would be outweighed by the burden on the sentencing process under 18 U.S.C. § 3663A(c)(3)(B).
- ☐ For other offenses for which restitution is authorized under 18 U.S.C. § 3663 and/or required by the sentencing guidelines, restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweigh the need to provide restitution to any victims under 18 U.S.C. § 3663(a)(1)(B)(ii).
- ☐ Restitution is not ordered for other reasons:

☐ Partial restitution is ordered under 18 U.S.C. § 3663(c) for these reasons:

DEPARTURE (Check all that apply)

☐ The sentence departs below the guideline range for the following reasons; or

☐ The sentence departs above the guideline range for the following reasons:

Pursuant to a Plea Agreement:

☐ based on 5K1.1 motion of the government based on the defendant's substantial assistance;

☐ based on a government motion pursuant to an early disposition program;

☐ based on a binding plea agreement for departure which the court has accepted (cite below reason, if applicable);

☐ based on a plea agreement which cites the below reason for departure, which the court finds to be justified; or

☐ based on a plea agreement which states that the government will not oppose a defense departure motion and cites the below reason.

Pursuant to a Motion Not Addressed in a Plea Agreement:

☐ pursuant to a 5K1.1 motion of the government based on the defendant's substantial assistance;

☐ pursuant to a government motion based on the below reason for departure; or

☐ pursuant to a defense motion based on the below reason for departure to which the government has not objected; or

☐ pursuant to a defense motion based on the below reason for departure to which the government has objected.

- ☐ Other than plea agreement or motion by the parties based on the below reason for departure.

Reason(s) for Departure

- ☐ 4A1.3 Criminal History Adequacy (explain)
- ☐ 5K2.0 Aggravating or Mitigating Circumstances (explain)
- ☐ 5K2.1 Death
- ☐ 5K2.2 Physical Injury
- ☐ 5K2.3 Extreme Psychological Injury
- ☐ 5K2.4 Abduction or Unlawful Restraint
- ☐ 5K2.5 Property Damage or Loss
- ☐ 5K2.6 Weapons and Dangerous Instruments
- ☐ 5K2.7 Disruption of Government Function
- ☐ 5K2.8 Extreme Conduct
- ☐ 5K2.9 Criminal Purpose
- ☐ 5K2.10 Victim's Conduct
- ☐ 5K2.11 Lesser Harm
- ☐ 5K2.12 Coercion and Duress
- ☐ 5K2.13 Diminished Capacity
- ☐ 5K2.14 Public Welfare
- ☐ 5K2.16 Voluntary Disclosure of Offense
- ☐ 5K2.17 High-Capacity Semiautomatic Firearm
- ☐ 5K2.18 Violent Street Gang
- ☐ 5K2.20 Aberrant Behavior
- ☐ 5K2.21 Dismissed and Uncharged Conduct
- ☐ 5K2.22 Age or Health of Sex Offenders
- ☐ 5K2.23 Discharged Terms of Imprisonment
- ☐ 5K3.1 Early Disposition, "fast-track" Program
- ☐ Other (e.g., 2B1.1 commentary, 5H1.1-5H1.6 or 5H1.11) (explain and state guideline and/or statutory basis). (Use Page 3, if necessary.)

AO 245B (Rev. 12/03) Judgment in a Criminal Case
Attachment (Page 3)—Statement of Reasons

DEFENDANT: ROBERT FRIEMANN
CASE NUMBER: CR 01-1168 (JS)
DISTRICT: E.D.N.Y.

STATEMENT OF REASONS
(Not for Public Disclosure)

ADDITIONAL PRESENTENCE REPORT AND GUIDELINE APPLICATION CHANGES
(If necessary.)

SPECIFIC SENTENCE IS IMPOSED FOR THESE REASONS
(If necessary.)

ADDITIONAL COMMENTS AND FINDINGS CONCERNING INFORMATION IN PRESENTENCE REPORT
(If necessary.)

ADDITIONAL REASONS FOR DEPARTING FROM THE GUIDELINE RANGE
(If necessary.)

Defendant's Soc. Sec. No. 077-38-5664
Defendant's Date of Birth: Oct. 15, 1947
Defendant's Residence Address: 194 East Shore Rd.
Huntington Bay NY 11743
Defendant's Mailing Address:

Sep. 17, 2004
Date of Imposition of Judgment

/s/ JOANNA SEYBERT
Signature of Judge

JOANNA SEYBERT, U.S.D.J.
Name and Title of Judge

Sep. 29, 2004
Date Signed

ATTACHMENT Page 4 FOR PRESENTENCE REPORT AMENDMENTS

The sentence is pursuant to the Guidelines but would be the same regardless of the Guidelines. Accepts the findings and conclusions in the PSR, the Addendum, the Second Addendum and Third Addendum except that it finds the Third Addendum inclusion of the tax loss of the NYS Department of Taxation and Finance to be unwarranted as not in the evidence of loss presented at trial.

Accepts all of the Addendum with respect to the update of co-defendants sentences and notes that the Court the defendant was acquitted by a jury of Counts 1-4 and Counts 6-8. Additionally the Court granted Michael Agoglia an acquittal at the close of the government's direct case.

Amends the Offense Conduct to include the following paragraphs 2-48 for informational purposes only. The government concedes that the defendant was not involved in the bribery/fraud scheme, the offenses of Isernio, the Blakes, McDonald, Pattison, Marotta and Tempera. The government agrees and the Court directs that references to

secret commissions as applicable to the defendant be deleted. Paragraph 57 is modified to delete that Friemann directed M. Blake to lie to authorities and the Court find that the defendant did give Blake a script as to the reasons for creation of DJB. As to paragraph 60 the Court declines to find that the deduction of $6,426 on the 1996 return was improper. There is no similar finding for the tax year 1997.

Paragraphs 64 related to Isernio's tax offenses is deleted as not relevant, Paragraphs 65-67 related a Conspiracy to deprive the Country of the honest services of Tempera are deleted as not relevant. Paragraphs 68-72 related to Isernio's structuring of cash deposits and obstruction of justice in paragraphs 75-77 are deleted. Paragraphs 73 and 74 regarding witness tampering are also deleted as irrelevant.

The Court finds that the applicable loss as reflected in Paragraph 80 should be amended to a total tax loss calculation of $3082 based on the 1998 S&F return in Count 5 and declines to find that the 1996 return of the Schneiders included false deductions. That amount is substituted in Paragraphs 82 and 105.

The sophisticated means and concealment 2 level enhancement in Paragraph 106 is denied, in that the defendant reported all income for S&F and the Court does not find that the DJB, WMB Agency and S&F were solely created to receive illegal payments.

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No. 05-710

In the Supreme Court of the United States

ROBERT F. FRIEMANN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

PAUL D. CLEMENT
Solicitor General
Counsel of Record

EILEEN J. O'CONNOR
Assistant Attorney General

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QUESTIONS PRESENTED

1. Whether a defendant may waive his right under the Speedy Trial Act of 1974 to be tried within 70 days of his indictment or appearance before a judicial officer.

2. Whether violations of the Speedy Trial Act are subject to harmless-error analysis.

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In the Supreme Court of the United States

No. 05-710

ROBERT F. FRIEMANN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a-7a) is not published in the *Federal Reporter*, but is reprinted in 136 Fed. Appx. 396.

JURISDICTION

The order of the court of appeals was entered on June 17, 2005. A petition for rehearing was denied on September 6, 2005 (Pet. App. 8a-9a). The petition for a writ of certiorari was filed on November 23, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted on one count of making a false statement on a federal tax return, in violation of 26 U.S.C. 7206(1). He was sentenced to three years of probation, fined $1000, and ordered to pay $3082 in restitution to the Internal Revenue Service (IRS).

1. The Speedy Trial Act of 1974 (STA), 18 U.S.C. 3161 *et seq.*, requires a defendant's trial to begin within 70 days of his indictment or appearance before a judicial officer, whichever occurs later. 18 U.S.C. 3161(c)(1). Periods of delay resulting from various matters are automatically excluded from the computation of the 70 days. 18 U.S.C. 3161(h).

In addition, any "period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government" is excludable "if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial," and the court "sets forth, in the record of the case, either orally or in writing, its reasons for [that] finding." 18 U.S.C. 3161(h)(8)(A). In determining whether a continuance would serve the ends of justice, courts are to consider whether the case is so complex that, absent a continuance, it would be unreasonable to expect adequate preparation for trial or pretrial proceedings. 18 U.S.C. 3161(h)(8)(B)(ii).

The STA provides that if the defendant is not brought to trial within the 70-day period, "the informa-

tion or indictment shall be dismissed on motion of the defendant." 18 U.S.C. 3162(a)(2). Dismissal may be with or without prejudice, depending on the district court's weighing of various factors, including the seriousness of the offense, the facts and circumstances of the case which led to the dismissal, and the impact of a reprosecution on the administration of the STA and the administration of justice. *Ibid.*; *United States* v. *Taylor*, 487 U.S. 326, 336-337, 342-343 (1988). "Failure of the defendant to move for dismissal prior to trial or entry of a plea of guilty or nolo contendere shall constitute a waiver of the right to dismissal." 18 U.S.C. 3162(a)(2).

2. Petitioner was one of several defendants in a bribery, money laundering, and tax evasion case involving the award of contracts by Nassau County, New York, to Beneficial Plan Administrators, Inc. (BPA). Petitioner was initially brought to trial, along with co-defendants Albert Isernio and Michael Agoglia, on January 13, 2002. With the consent of the parties, the district court excluded all of the time before that date from the STA's 70-day clock because of the case's complexity. See Pet. App. 104a-105a.

During jury selection, petitioner moved to sever the charges against him from those against Isernio and Agoglia. The district court granted that motion, stating that petitioner "shall be tried on all counts presently pending against him in one trial, to be held subsequent to Mr. Isernio's and Mr. Agoglia's trial." Pet. App. 28a.

The trial of Isernio and Agoglia proceeded without petitioner. The district court dismissed the charges against Agoglia. The jury hung on the charges against Isernio, and the district court declared a mistrial on April 10, 2003. Pet. App. 105a.

On June 27, 2003, the district court held a status conference at which the government indicated that it intended to supersede the indictment against petitioner, reduce the number of charges against him, and then try petitioner separately from Isernio, whose retrial was scheduled to begin in January 2004. Pet. App. 38a-43a. During the conference, petitioner did not raise any speedy trial concerns or request a trial on the existing indictment. Instead, he requested and received a briefing schedule for filing a motion to dismiss the non-tax charges. *Id.* at 39a-40a. In July 2003, petitioner moved to hold that briefing schedule in abeyance pending the government's decision on whether to supersede the indictment. *Id.* at 52a, 57a-58a.

On September 18, 2003, petitioner moved to dismiss under the STA. Petitioner contended that the 70-day clock began to run on April 10, 2003—the date the district court declared a mistrial in the Isernio trial—and therefore expired before the June status conference and the July extension of the briefing schedule. See Pet. App. 47a-48a, 63a.

The district court denied that motion. Pet. App. 103a-109a. The court found that petitioner had repeatedly consented to the designation of the case as "complex" pursuant to 18 U.S.C. 3161(h)(8)(ii), and to the resulting delays. Pet. App. 106a-107a. The court further found that petitioner requested a severance from Isernio and Agoglia, "kn[owing] that his trial would occur *after* a resolution of the case against Isernio and Agoglia." *Id.* at 105a; see *id.* at 107a. In denying reconsideration, the court explained that petitioner "consented and made an agreement with the government that as a condition of the severance, his trial will follow the trial of Mr. Isernio, and until Mr. Isernio's case was

completed, that the speedy trial time clock on behalf of [petitioner] would not begin" to run. *Id.* at 111a.

Following a jury trial, petitioner was acquitted on all but one count, count five, which charged petitioner with making a false statement on a federal tax return, in violation of 26 U.S.C. 7206(1). Petitioner was sentenced to three years of probation, fined $1000, and ordered to pay $3082 in restitution to the IRS. Pet. App. 117a, 119a-121a.

3. The court of appeals affirmed. Pet. App. 1a-7a. Relying primarily on its decision in *United States* v. *Zedner*, 401 F.3d 36, 45 (2d Cir. 2005), cert. granted, No. 05-5992 (Jan. 6, 2006), the court held that defendants may validly waive their STA rights by "reqest[ing] an adjournment that would serve the ends of justice." Pet. App. 3a-4a (quoting *Zedner*, 401 F.3d at 45). On the record here, the court of appeals upheld the district court's findings that petitioner waived his speedy trial rights by "agreeing to delay his trial pending the outcome of Isernio's" (*id.* at 3a; see *id.* at 3a-4a), and that the resulting delay served the ends of justice because "(1) the adjournment of [petitioner's] trial was designed to promote goals of judicial efficiency, and (2) this goal could not be attained by proceeding with [petitioner's] trial prior to the ultimate resolution of Isernio's case." *Id.* at 4a.

In an alternative holding, the court of appeals also determined that any error was harmless under its decisions in *Zedner*, 401 F.3d at 47-48, and *United States* v. *Gambino*, 59 F.3d 353, 362-363 (2d Cir. 1995), cert. denied, 517 U.S. 1187 (1996). Pet. App. 4a-5a. The court held that any dismissal under the STA would be "'without prejudice' because the charged offenses were serious, the Government acted in good faith, [petitioner]

benefitted significantly from delays, and [petitioner] failed repeatedly to raise any speedy trial concerns." *Id.* at 4a. "In such circumstances," the court concluded, "the Government could (and likely would) have re-indicted [petititioner], leaving [petitioner's] legal position unchanged." *Id.* at 4a-5a (footnote omitted). Thus, the court held that denial of the motion to dismiss was harmless. *Id.* at 5a.

DISCUSSION

Petitioner contends (Pet. 15-25) that the court of appeals erred in holding that he waived his right to a speedy trial and that any speedy-trial error was harmless. In *Zedner* v. *United States*, No. 05-7009 (Jan. 6, 2006), this Court granted a petition for a writ of certiorari that poses the questions whether an alleged violation of the STA is subject to waiver and harmless-error analysis. Pet. at i, *Zedner*, *supra* (No. 05-7009). The decision below expressly relies on the Second Circuit's decision in *Zedner*, Pet. App. 3a-4a, and the petition here purports to "adopt and incorporate by reference what *Zedner* has set forth in his petition as to why these are issues warranting review by this Court." Pet. 14. Accordingly, this Court should hold the petition pending its decision in *Zedner*, and then dispose of the petition as appropriate in light of that decision.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *Zedner* v. *United States*, No. 05-5992, and then disposed of as appropriate in light of that decision.

Respectfully submitted.

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ALAN HECHTKOPF
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Attorneys

FEBRUARY 2006

(3)

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IN THE

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ROBERT F. FRIEMANN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR THE PETITIONER

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No. 05-710

IN THE

United States Supreme Court

OCTOBER TERM, 2005

ROBERT F. FRIEMANN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF FOR THE PETITIONER

STATEMENT

Respondent's Opposition Brief urges that the *Friemann* petition should be held in abeyance pending the Court's decision in *Zedner v. United States*, No. 05-5592, which is scheduled for argument during the week of April 17, 2006. The two issues presented in *Zedner* involve (i) whether Zedner should be held to have waived his right to complain about not receiving a speedy trial within the 70-day limitation imposed by the Speedy Trial Act ("STA"), 18 U.S.C. § 3161, and (ii) assuming there was no effective waiver by Zedner of his rights under the STA, whether the violation of Zedner's STA rights can properly be deemed to consti-

tute "harmless error" and not require dismissal of the indictment.

Friemann, whose petition presents the same issues, opposes Respondent's suggestion, and, instead for the reasons set forth below, urges the Court to grant Friemann's petition and consolidate *Friemann* for argument with *Zedner*. The *Zedner* merits brief is due February 21, 2006. Petitioner is prepared to file his merits brief with but a week's notice from the Court's order, in order to be heard jointly with *Zedner*.

In the alternative, petitioner requests that our petition for certiorari—which demonstrates how a peripheral defendant in a multi-defendant case can be overlooked, and forgotten, by the district court—be treated as an *amicus* submission in *Zedner*.

DISCUSSION

As noted both cases present the same two STA issues—waiver and harmless error. Although petitioner is not yet fully aware of the precise arguments which will be advanced by Zedner's counsel in his merits brief, petitioner has adopted Zedner's legal arguments as set forth in his petition for certiorari and is not contemplating a duplication of Zedner's discussion of the law or the issues. However, the *Friemann* record presents to the Court a far more simple, clear-cut fact pattern, which, we believe, will facilitate the Court's analysis when deciding these issues. Furthermore, while we argue, like *Zedner*, that there can be no non-statutory waiver under the STA (Pet. 15-18) it is conceivable that, on *Zedner's* facts, there could be an affirmance based on "waiver" without reaching harmless error issue. *Friemann* presents facts that are undisputed and, we

believe, point clearly to a conclusion of "no waiver" as a matter of law, and, accordingly, the harmless error issue, which is so important to the administration of the STA, will very likely be squarely before the Court.

A. The "waiver" in *Zedner*

Zedner presents a hodgepodge of facts upon which the Respondent will rely to argue the correctness of the Court of Appeals finding that Zedner waived his STA rights. Such facts include Zedner's execution of a "waiver for all time"; Zedner's January 31, 1997 request for delay and his counsel's May 2, 1997 application to be relieved as counsel; and the August 2000 unavailability of both Zedner (found not competent) and his counsel (pregnancy). See *Zedner* 401 F3d at 40-41.

B. The "waiver" in *Friemann*

In contrast, the *Friemann* record clearly establishes that this petitioner never sought to delay his trial except on two occasions:

The first occurred on January 15, 2003, when, with the prosecuion's consent, Mr. Friemann was granted a severance from the co-defendants' (Isernio and Igoglia) trial, then in jury selection (Pet. App 28a).

The second occurred on June 27, 2003, when, following the mistrial with respect to Isernio (hung jury), Mr. Friemann's counsel proposed a motion schedule to narrow the charges as a result of exonerating witness testimony revealed at the Isernio trial. However, Friemann's proposal became moot when the prosecution failed to return a superseding indictment that was expected to narrow the

charges within the time period promised to the Court. (Pet. App.41a-44a)

At that point, faced with at least four months of further delay, Friemann filed his motion for dismissal under the STA rather than await the outcome of *two* Isernio trials—a lengthy retrial of S-2 and a trial upon a newly returned indictment (No. 03CR866) scheduled to begin in January 2004. (Pet.App.47a-54a)

Despite the filing of Friemann's speedy trial motion on September 18, 2003, the district court did not render a decision on that motion until another five months had elapsed, that is, on February 26, 2004, a fact omitted by the government's opposition to our petition (Pet. App.103a). During that five month period Mr. Isernio was tried and convicted on the new indictment, 03CR866, and pled guilty to S-3 (successor to S-2) on January 27, 2004.

On March 29, 2004 the district court held a telephone conference and confronted Friemann's counsel with the choice of either waiving his client's right to speedy trial or selecting a jury the following day (Pet. App.114a-115a). Counsel refused to waive his client's right, and proceeded to jury selection the following day, another fact omitted in the government's opposition to our petition.

On April 14, 2004, Friemann was acquitted of seven of the eight counts on which he was tried. The acquittals exonerated Friemann of the corruption charges, but left him convicted of improperly causing a home office deduction to be claimed on a partnership return.

C. The harmless error issue

Another reason for jointly hearing *Friemann* with *Zedner* consists of the fact that the Court of Appeals' application of "harmless error" in Friemann has drawn the teeth of the STA. In *Zedner* the Court of Appeals applied harmless error to prevent what it characterized as "perverse outcomes." It found that dismissal of the *Zedner* indictment was not warranted under the STA where, according to the Second Circuit, the record showed that "the court's failure to start a trial during a period when the trial could not have been conducted—because Zedner was not competent to stand trial and Zedner's counsel was not available. Zedner has failed to put forth any convincing argument that this delay prejudiced him at his trial." See 401 F3d at 47-48.

In *Friemann* the Court of Appeals went further and engaged in speculation based upon a hypothetical scenario to avoid dismissal of the indictment. The Court held that "assum[ing] *arguendo* that Friemann's speedy trial rights were violated," the error was "harmless" because it was "likely" that Friemann would have been re-indicted had the speedy trial motion resulted in a dismissal without prejudice (Pet. App.4a-5a). Thus, the Second Circuit's standard to prevent "perverse outcomes" has now been extended to "likely" speculation, in order to avoid the sanction of dismissal.

Friemann adds to the foundation for the Court's consideration of the harmless error issue. As Justice Blackmun noted in *United States v. Taylor*, 487 U.S. 326, 342 (1988): "Dismissal without prejudice is not a toothless sanction: it forces the Government to obtain a new indictment if it decides to reprosecute...." Contrary to the Court of

Appeals holding, Friemann can demonstrate that re-indictment of him was [and is] not "likely" (See Pet. 23-24), and that the Court of Appeals has effectively read the mandatory dismissal sanction out of the Speedy Trial Act. It has, in short, gutted this statute.

Should this Court uphold the Court of Appeals' finding of "waiver" in *Zedner*, then Zedner's "harmless error" issue would fall as moot. At the same time, a finding of "no waiver" in *Friemann* would require this Court to decide the "harmless error" issue.

For these reasons, we urge the Court to grant certiorari, and order that *Friemann* be consolidated with *Zedner*.

CONCLUSION

For the foregoing reasons, it is respectfully suggested that the Court should grant certiorari and consolidate this matter for argument with *Zedner*. In the alternative, we respectfully request that, at the least, the Court consider our petition, appendix and reply as, in effect, an *amicus* submission in *Zedner*.

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Respectfully submitted,

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